TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 466

LARRY DAYTON HUDSON, PETITIONER,

vs.

NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED APRIL 16, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

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LARRY DAYTON HUDSON, PETITIONER,

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NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

INDEX

[fol. a]

IN THE RECORDER'S COURT OF CUMBERLAND COUNTY, STATE OF NORTH CAROLINA

Criminal Action

STATE WARRANT

STATE

vs.

LARRY HUDSON, Highland Acres, White; RAY STARLING; Rt. 2, City; DAVID CAIN

Elmer Arnette (Inf. & Belief) being duly sworn, complains and says that at and in said County, in Pearces Mill Township, on or about the 14 day of Feb., 1958 Larry Hudson, Ray Starling, David Cain, did unlawful, wilfully and feloniously take and steal from the person the amount of $24.00 in U. S. Currency, contrary to the form of the statute, and against the peace and dignity of the State.

s/ Elmer Arnett.

Subscribed and sworn before me this 18th day of Feb., 1958. s/ A. C. Kitchen, JP, Cumberland County.

THE STATE OF NORTH CAROLINA

To Any Lawful Officer of Cumberland County, Greetings:

You are hereby commanded forthwith to arrest Ray Starling, David Cain, Larry Hudson and them safely keep, so that you have them before the Recorder's Court of Cumberland County Immediately, to answer the above complaint, and be dealt with as the law directs.

Given under my hand and seal of said Court, this 18 day of Feb., 1958.

s/ A. C. Kitchen, JP, Cumberland County.

[fol. b] [Endorsed:] Recorder's Court. No. 12841. State vs. Larry Hudson, Ray Starling, David Cain. Warrant for Assault & Robbery. Witnesses for the State: W. G. Spells, E. Arnette, J. D. Snipes. Received 2-18-1958. Served 2-18-1958. L. L. Guy, Sheriff Cumberland County. Per J. D. Snipes, D.S.

[fol. c] IN THE RECORDER'S COURT, CUMBERLAND COUNTY

Warrant No. 12841

Criminal Docket

		2-25-58.
Issuing Warrant	$1.50	1.50
Docketing	.50	.50
Copies each defendant	1.00	
Subpoena, each name	.20	
Filing Papers	.25	.25
Recognizance, ea. where no bond taken	.25	
Taking Bond, including justification	.75	.75
Continuance	.25	
Seal, when necessary	.25	
Empaneling Jury	.25	
Motion, entry and record of	.10	
Notices	.25	
Notices, ea. name over 1 in same paper	.10	
Affidavit with jurat and certificate	.15	
Judgment final (against each defendant)		5.00
Judgment nisi	.50	
Preparing Bill of Costs	.80	
Recording in Minutes	.30	.30
Fine against Defendant		.50
Solicitor		
Jury Fund, when jury empaneled	6.00	6.00
Sheriff or Police arrest	1.50	
State Treas.	1.00	
		14.80
J. D. Simproch		5.50
City Cost		
Magistrate		
Constable		
State Witnesses		
		$20.30
Defendant's Witnesses		

JUDGMENT

Deft. Ct.—As to Ray Starling, judgmt nisi — causes as to Starling. After hearing the evidence the Court finds probable cause and binds the deft. David Cain &

Larry Hudson over to Superior Court. Bond set at $200.00 as to David Cain. Larry Hudson, $400.00, changed to $200.00. Deft. Reuben Grimsley transferred to Cumb. Co. Juvenile Court.

——, Clerk.

[fol. d] IN THE SUPERIOR COURT OF CUMBERLAND COUNTY, MARCH TERM, A.D. 1958

INDICTMENT

The Jurors for the State upon their oath present, That Larry Hudson, Ray Starling & David Cain, late of the County of Cumberland, on the 14 day of February in the year of our Lord one thousand nine hundred and fifty-eight, did with force and arms, at and in the County aforesaid, unlawfully, wilfully, and feloniously rob and take $24.00 in U.S. Money from the person of W. G. Spell, the property of W. G. Spell, without his consent, and against his will, by violence, intimidation and putting in fear, against the form of the statute in such case made and provided and against the peace and dignity of the State.

s/ E. M. Braswell, Solicitor.

No. 10,276

STATE

VS.

DAVID CAIN, LARRY HUDSON, RAY STARLING

INDICTMENT—VARIOUS CASES

Robbery , Pros.

Witnesses:

X W. G. Spell.
X Elmer Arnett, DS.
J. D. Snipes, DS.

Those marked x sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found.

x A True Bill

s/ C. R. Dawkins, Foreman Grand Jury.

[fol. 1] IN THE SUPERIOR COURT, CUMBERLAND COUNTY, NORTH CAROLINA, MARCH TERM 1958

STATE OF NORTH CAROLINA

vs.

LARRY HUDSON, RAY STARLING AND DAVID CAIN

Stenographer's Transcript of Evidence

Honorable Heman R. Clark, judge presiding.

APPEARANCES

State represented by Solicitor Braswell and Assistant Solicitor Blackwell; defendant David Cain represented by Attorney McGeachy; other defendants not represented.

Defendant Larry Hudson: I don't have funds to employ an attorney and am not capable of defending myself. If the Court please, I would like to ask the Court to employ me an attorney.

Attorney Blackwell: I will say that he is not able to employ an attorney, but as to whether he is able to represent himself I cannot say.

Court: The Court will try to see that your rights are protected throughout the case.

The defendant Cain, through counsel entered a plea of not guilty; the defendants Hudson and Starling pleaded not guilty.

Court: (After the State had passed the jury): You (addressing defendants) now have the right to excuse anybody on the jury that you wish to.

[fol. 2] G. W. SPELL, a witness for the State, being first duly sworn, testified as follows:

Direct Examination.

Questions by State (Assistant Blackwell):

Q. Your name is Mr. W. G. Spell?
A. Right.
Q. Mr. Spell, where do you live in this county?

A. Down 301 about eight miles and three tenths from Fayetteville.

Q. How long have you been living in this county?

A. The eighth of next month will be seven years.

Q. Where do you work?

A. The Utah Shopping Center Housing Project.

Q. Mr. Spell, on or about the 14th day of February, 1958, did you have occasion to see any one or all three of these individual defendants sitting here?

A. I saw that one, the third one from the man at the table, he is the one.

Q. Which one are you pointing at?

A. The second fellow across the book there, he is the one.

Court: We have to identify him?

A. The one with no coat. (Indicating Larry Hudson).

Q. Is this the man you are talking about?

A. He is the one took the billfold.

Q. Where did you first see those boys?

A. The boys there done the robbing. He come running [fol. 3] and jumped in the car fixing to back out.

Court: We have to get this a little clearer. First he said he saw Larry Hudson and then you asked where did he see these boys.

A. Down on the street and he was going to take me to the house.

Questions continued by Attorney Blackwell:

Q. Is Larry Hudson the one you are talking about?

A. Yes, sir.

Q. You saw him on the street?

A. Yes, sir.

Q. Where did you see him on the street, what part of town?

A. Right across the street from the courthouse, about the second or third store up.

Q. About what time of day or night did you see him?

A. I say probably seven o'clock.

Q. Was it dark at that time?

A. Getting pretty dark.

Q. Where had you been before you saw him?

A. I had come in from work to town.

Q. All right, where?

A. I had come from work to town and paid a few bills and come down and got a beer and he wanted to take me home.

Q. Just a minute now, did you go to a bar?

A. The second bar from the Market House.

[fol. 4] Q. What is known as the Flamingo Bar?

A. Yes.

Q. And in relation to the Flamingo Bar, where did you see the defendant Larry Hudson?

A. Which one you call Larry, that one with the coat or the one with the coat off.

Q. The one with the coat off, where did you see him?

A. He came and got in the car. The fellow was backing out, a blond headed boy driving.

Q. Did you ever see either one of these three boys in the bar?

A. That boy done the robbing didn't go in there.

Q. When you say the boy done the robbing, you have to point him out?

A. The one sitting over there.

Q. In the middle?

A. Yes, sir.

Q. Larry Hudson, where did you first see him?

A. He came running up street hollering, "Let me go with you".

Q. Who did, Larry Hudson?

A. Yes, sir.

Attorney McGeachy: Objection as to the other two, as it was not in their presence. I will try to take on all three as long as their interests don't conflict.

Court: Let me suggest that you go back to the Flamingo [fol. 5] Bar and start over again and see if you can't make it a little clearer.

Questions continued by Attorney Blackwell:

Q. Now, Mr. Spell, when you were at the Flamingo Bar, did you see either one of these three in the bar?

A. No, sir, I did not.

Q. All right, when you came out of the Flamingo Bar, did you see either one of these three boys?

A. I think the one sitting on the end, has on the red jacket, patted me on the shoulder and said, "Where you going, Buddy?"

Objection by Attorney McGeachy, "Unless he knows."

Q. Do you know that was the one?
A. His face looks very familiar to me.
Q. Can you say today that the man sitting over here by the name of Ray Starling is the same one who came up to you that night outside of the Flamingo Bar?
A. Yes, sir.

The Court: His name is what?

A. Ray Starling.

Questions continued by Solicitor Blackwell:

Q. What did he say to you at that time?
A. He proposed to take me to the house.
Court: This is competent only as to the defendant Ray Starling, not as to the other two defendants.
Q. Go ahead and tell what he said.
[fol. 6] A. "What about taking you home? Where you live?" And he said, "I take you for a buck," and I said, "That is cheaper than walking."
Q. He was going to take you home, where you live for a dollar?
A. Yes, sir.
Q. Did he have an automobile?
A. I guess it was his; I didn't ask him.
Q. After you had some conversation——

Objection by defendants.

Q. Did you have some conversation with him? If so, then what did you do?
A. We got in the car and started for home.
Q. Who was in the car with you when you started for home?
A. Won't anybody but just those two.
Q. Just you and Ray Starling, the boy on the end?
A. Yes, sir.
Q. After you got in the car, did anybody else get in the car?

A. The boy sitting there, the second boy.

Q. Larry Hudson?

A. He came running and hollered, "Wait", like he was getting left or something.

Q. Did he also get in the car?

A. Yes, sir, got in the front seat.

Q. Where did he sit?

[fol. 7] A. Sat in the front seat.

Q. Where were you sitting?

A. Back seat.

Q. Who else got in the car, if anybody did?

A. Well then, the fellow on the end of the table got in the back seat and the blond headed boy was setting under the wheel and the car cranked and headed for home.

Q. You say a blond headed boy?

A. I ain't seen him.

Q. How many people were in the car altogether?

A. There was four of us.

Q. Just four altogether?

A. Right.

Q. Now, Mr. Spell, before you got in the car, how many beers had you had to drink?

A. Well, I drink three.

Q. All right, after you got in the car with these two boys Ray Starling and Larry Hudson, where did you go?

A. Down to Liberty Point and they wanted a pint of liquor and I wouldn't get it because I figured they were under age.

Q. You did not buy any liquor?

A. No.

Q. After that what did you do?

A. Left there and headed down 301 for home and got out beyond the Patrol Station.

[fol. 8] Q. You mean Highway Patrol Station?

A. Yes, sir. Took the first road to the left.

Q. Where did that road lead to?

A. Down what I call a plain dirt road and the first road they come to, to the right, over the second hill and ducked in like they were trying to hide something.

Objection by defendants.

Court: Just describe what they did.

Questions continued by Solicitor Blackwell:

Q. After you got out on the road, what happened then?

A. They stopped the car and turned the lights on park and said, "Are you able to get out?" and I said, "Yes, sir," and one of them opened the door to the front.

Objection by defendants, "Unless he designates which one."

Q. Which one opened the door, if you know?

A. The blond headed boy driving the car that night.

Q. The blond headed boy driving and we don't know who he is at this time?

A. Right.

Q. After the car door opened, what happened then?

A. They all come around to the front of the car while I was stepping out and told me to hit the ground and hold my hands up. The boy sitting there with the blue shirt, he crawled out of the front seat into the back.

Q. He told you to do what?

[fol. 9] A. "When you hit the ground, hold your hands straight up; don't get up," and I said, "Yes, sir."

Q. What did you do?

A. I stepped out.

Q. Did you hold your hands up?

A. Certainly.

Q. When you held your hands up, what happened?

A. He walked up to me and searched every pocket I had and took the billfold and money that was in it, two fives and a ten.

Q. You mean Larry Hudson did that?

A. Yes, sir, Larry Hudson.

Q. Did you have any money in your billfold?

A. Yes, sir.

Q. Do you remember how much you had in your billfold?

A. Well, I had a ten dollar bill, two fives and four ones and eighty-five cents in change, all told.

Q. Did he take your billfold at that time?

A. Yes, sir.

Q. Did you ever get your billfold back?

A. No, sir.

Q. After he took your billfold, what happened then?

A. He turned around and headed—the fellow driving the car said, "Get in the car and we'll drag him," I understood them.

Q. Will you repeat that?

[fol. 10] A. He just searched my pocket and after he could not find any more money, he turned around and two were standing with fists balled up like if I give any trouble they would do something else.

Court: Just tell what they were doing. You can't tell what it was like to you or your opinion about that. Just describe how they were standing and what they did. Go ahead.

A. Two were standing in front of me to keep me from causing any trouble and he walked between me and them and walked all around feeling my pockets.

Q. Who did that?

A. The boy in the middle?

Q. The one in the middle?

A. Mr. Hudson, that is right, yes, sir.

Q. And after he got your wallet, what did he do then, Mr. Spell?

A. Turned right short, took two steps in the car and drove off.

Q. Did you see them again that evening?

A. Yes, sir.

Q. Where did you see them the next time?

A. I got out in the streak of woods about two hours later and they rode fourteen time in a circle to see if I was still in the woods.

Q. Did they ever stop?

A No, sir, just slowly dragging through.

[fol. 11] Q. What did you do after they left?

A. Come on down through the woods out to the main road and out to a man's house and they were stalled over in the sand there and they got out of that and went on their business and I got a fellow to carry me home.

Q. When did you take out a warrant for their arrest?

A. Saturday morning.

Q. This happened when?

A. Friday night, the fifteenth.

Q. Now Mr. Spell, the best you can remember on this particular night in question, of the three defendants sit-

ting here in this court room this morning, which one do you remember seeing in the car on that night?

A. I would say the two on the end was in the car.

Q. The one on this end, Ray Starling and the one in the middle, Larry Hudson, are they the two you are pointing out?

A. Yes, sir, and the other is unknown to me.

Q. You don't remember seeing him?

A. Not in the car unless he had his hair peroxided.

Q. You don't remember seeing this man (indicating Cain)?

A. That is right.

Q. Mr. Spell, at the time your money was taken, did you in any way resist the taking of your wallet?

A. Not a bit.

Q. If anything was said to you about that time, do you remember who spoke the words to you about your wallet? [fol. 12] A. The gentleman sitting there, looking right straight in my eyes.

Q. I can't understand you, Mr. Spell.

A. The gentleman sitting there.

Q. Speak his name.

A. Yes, Mr. Hudson.

Q. The boy in the middle?

A. Yes, sir.

Attorney Blackwell: Examine him.

Attorney McGeachy: Shall I examine him for all the defendants?

Court: No, just for your own client, whatever examination you want to make. I think you probably have a conflicting interest there.

Attorney McGeachy: I do not care to ask any questions for David Cain.

QUESTIONING BY COURT

Court: I feel that it is necessary that I ask one question. I think I interrupted the witness. What conversation or what statements were made by these two boys that you identified, Hudson and Starling at the time they were standing there after they had taken your pocketbook or

taken the money out of it? What statement did they make then?

A. They didn't make no statement after we got out of the car, not to me.

Court: What statement did they make before you got out of the car?

A. That Hudson boy was in the front seat and said, [fol. 13] "I'll get back there and get him out," and the only statement he said to me, he said, "Can you get out or have I got to put you out?" And I said, "Open the door and I get out."

Questions continued by Court:

Q. What was the statement made with reference to holding your hands?

A. He just asked me to hold my hands up when I hit the ground and to keep them up until he said put them down, that was Mr. Hudson.

Q. Did he have any weapon?

A. No, sir, not as I seen, just an open hand job. He had some body guards, I would call it, standing there for help if he needed it.

Q. Were you in fear?

A. No, sir, I didn't get scared or nothing.

Q. Not at all?

A. Not a bit, didn't even get mad.

Q. You didn't offer any resistence?

A. I did not give them a bit of trouble.

Q. Why did you let them take your pocketbook if you were not afraid?

A. I figured three men are better than one, way down in the woods; they didn't even give me time to study it over, stopped the car and opened the door and flew out, just like that.

Q. You had one ten dollar bill, two fives and three——

A. And eighty-five cents in change.

[fol. 14] Q. Did they take it all?

A. Yes, sir, and my pocket knife.

Q. What was the statement you made awhile ago about the fact that they would drag you?

A. They meant they would shut the door to of the car when I tried to get back in and the one driving would take off and if I tried to hold on and get back in, maybe they would bust my face open or something like that.

Q. They didn't try to do anything like that?

A. No, but they were very nice about it.

Cross-examination.

Questions by Attorney McGeachy:

Q. Mr. Spell, have you been tried and convicted of anything in court?

A. Not nothing concerning, I would say not nothing but plain drunk one time.

Q. How many times have you been convicted for drunk?

A. Twice that I know of.

Q. Twice that you know of?

A. Yes, sir.

Q. How many other times that you don't know of have you been convicted?

A. Not any.

Q. When was that, that you were convicted for public drunkeness?

A. Christmas Day.

[fol.15] Q. And when else?

A. Five years ago.

Q. What, five years ago?

A. Yes.

Q. Now, what court was that you were convicted in, sir?

A. City Hall was first and this over here was the second.

Q. All right, what other courts have you been convicted in besides those courts for public drunkeness?

A. Not any.

Q. What else have you been convicted of besides public drunkeness?

A. Not anything.

Q. What kind of work have you been doing, sir?

A. Public work.

Q. What type of work?

A. Flat labor.

Q. Flat labor?

A. Yes, sir.

Q. What type of work is that?

A. By hand tools.

Q. Who you been working for?

A. I been working for Utah Housing Project, landscaping, setting out shrubbery and first one thing an another in yards.

Q. In fact, when the weather was so bad, you weren't working anywhere, were you?

A. Yes, sir.

[fol. 16] Q. Where were you working on the 13th day of February, if you know?

A. Out at Utah Housing Project.

Q. What kind of job did you have there?

A. Day labor, we call it.

Q. Did you work every day?

A. Every day I have been there.

Q. What did you earn?

A. A dollar an hour.

Q. A dollar an hour?

A. Yes, sir.

Q. Did you work every day?

A. Every day my folks ain't sick and I can't get there.

Q. What?

A. I work every day I am not sick.

Q. In February did you work every day when you weren't sick?

A. Yes, sir.

Q. What caused you to get sick? Did you get sick very often?

Objection by state.

Q. Did you have alcoholic poisoning?

A. No, sir, I never was that crazy about it.

Q. How, how much alcohol had you had on the night of the 14th of February?

A. Three cans of beer; I didn't have any alcohol that day.

[fol. 17] Q. How long had you been up here drinking beer?

A. I had been there I would say thirty minutes.

Q. In other words, you tossed down three cans of beer in thirty minutes, is that right?

A. Right.

Q. Well, you felt that a little bit, d in't you?
A. Well, I knowed what I was doing, as good as I do now.
Q. How did you get down town?
A. I was already in town.
Q. What?
A. I was already in town, on main street.
Q. How did you get down to main street?
A. City bus.
Q. And what day of the week was this?
A. On Friday evening.
Q. Friday evening?
A. Yes, sir.
Q. You hadn't been paid off, weren't going to be paid off until Saturday?
A. I get paid on Friday evening at 4:30.
Q. Had you been paid?
A. Yes, sir.
Q. How much had you been paid?
A. A full week's work.
Q. How much was that?
A. After everything taken out, forty-six dollars and [fol. 18] seventy-five cents.
Q. You had forty-six dollars and seventy-five cents paid to you on Friday afternoon at 4:30, is that right?
A. Yes, sir.
Q. Where did you then go after 4:30?
A. Come from out there to town.
Q. All right.
A. And from town out to the robbery and on out to where I room.
Q. I am talking about where did you come after you got paid at 4:30? What went with your money?
A. Well, they got what I hadn't spent of it.
Q. Where had you spent the other and when?
A. That evening.
Q. Where abouts?
A. I paid some bills I owed.
Q. How much did you pay and where did you pay it? Did you owe any beer bills?
A. No, sir, I ain't that a-fire on drinking. I don't buy stuff on credit like that.
Q. What other debts did you have?

A. I had some finance running ten or twenty dollars, what I had to finance on the Frigidaire.

Q. Where did you go to pay that?

A. Well, the bill I paid that evening was around near the old bus station, across from that liquor store, a place [fol. 19] where I borrowed fifty dollars and had to pay so much a month.

Q. You operate from these places close to the liquor store, don't you, Mr. Spell?

A. No, sir, not particularly.

Q. Well, how much did you pay the finance man at the store near the liquor store?

A. Ten dollars a month.

Q. I know, but how much did you pay him Friday afternoon after 4:30?

A. Ten dollars, all that was due.

Q. Ten dollars, that is all you paid him?

A. Yes, sir.

Q. Where did you go when you left the store next to the liquor store?

A. I walked through the dime store and on down to the corner and drank my beer and was to go home.

Q. Then out of the $46.75, you hadn't paid but ten dollars, had you?

A. Right.

Q. Did you drink the rest of it up in beer?

A. No, sir, I don't have room for that much.

Q. What went with the difference of the money, $24.85 I believe it was, and—the money you say these boys took from you; what happened to the difference of the $24.85 and the other money, whatever it was that you said you had been paid?

A. Well, I had spent it that evening.

[fol. 20] Q. I asked you where you had spent it and you said you had paid ten dollars at the finance company and I asked you where you had spent any other money, I am asking you that now.

A. I would have to go up and get up the bills and figure it up, I guess.

Q. Did you get a few cans of beer after you paid that ten dollars?

A. I always try to meet my appointments before I

drink a beer. I always try to pay my bills and get groceries before I start drinking beer.

Q. You know after you start drinking beer you might not have any.

A. Very naturally you won't have enough to meet all your appointments if you start drinking before you pay your bills.

Q. You drink right often?

A. Anywhere from two to three on pay day.

Q. Just on pay day?

A. Yes, sir.

Q. How much did you pay, you didn't pay five dollars each for those beers, did you?

A. No, sir.

Q. How much did you pay for the beers?

A. Fifteen cents a glass.

Q. Fifteen cents a glass?

A. Yes, sir.

[fol. 21] Q. That is forty-five cents, now where did the rest of all that money go to?

A. Well, if I can't find the bill, must have been like the rest, went with the wind.

Q. You mean to say, Mr. Spell, you don't even know where your money goes?

A. Yes, sir, I know where it goes.

Q. When did it go?

A. It went in that boy's pocket side of the table.

Q. I am not talking about that twenty-four dollars you say he got; I am talking about the other money, where did the rest go?

A. I didn't make a full week that week.

Q. Didn't you say you had been paid forty-six dollars?

A. You want to know how much I was actually paid weekly?

Q. No, I asked you how much were you paid?

A. I drawed thirty-three dollars and ninty-five cents that Friday.

Q. What?

A. I said thirty-three dollars and ninty-five cents.

Q. Now you are getting it down a little bit, to thirty-three, ninty-five, is that right?

A. I didn't have a full week.

Q. I don't care whether you had a full week or a full hour. I am asking you how much money you had, Mr. Spell. You can understand that, can't you?

[fol. 22] A. Yes, sir.

Q. Well, you had thirty-three dollars and ninty-five cents, is that right?

A. Yes, sir.

Q. And you spent ten dollars of that, is that right?

A. Yes, sir.

Q. And that left you twenty-three dollars and ninty-five cents?

A. Right.

Q. And then you spent forty-five cents for some beer, didn't you?

A. Yes, sir, they didn't give me any.

Q. They didn't give it to you?

A. No, sir.

Q. And so then after that, you did not even have twenty-four dollars in your pocket, did you?

A. Not the way you counted it here. I didn't.

Q. Well, do you know any other way you could count it up?

A. The way I first told you, was the way it would count.

Q. You say you had a ten dollar bill——

Objection by State.

Court: Let's don't go around again.

Questions continued by Attorney McGeachy:

Q. Well, actually, these boys didn't take twenty-four dollars like you swore they did, did they?

[fol. 23] A. It was in my wallet and I didn't take it out in between and I looked good with matches after they left.

Q. Why do you say they took twenty-four dollars?

A. That is what was in the billfolder that night.

Q. You haven't got one of these billfolds that manufactures money, have you?

A. No, sir, but I could use one, though.

Q. You weren't so drunk you didn't know how much money had, were you?

A. I put twenty-four dollars in the billfolder and buttoned the pocket to take home.

Q. Didn't you testify awhile ago you paid ten dollars and then in addition to that you paid some other bills and you bought three glasses of beer, isn't that right?

A. That is right.

Q. So you did not have over about one or two dollars left after you drunk up all the beer you could held in your stomach, did you?

A. I did not drink all I could hold, sir.

Q. Actually, you don't really know what happened to you this night, do you?

A. Yes, sir.

Q. You mean to say you were staggering around here on the streets and got up with a boy you never had seen before and he asked to take you home?

A. I didn't ask him; he asked me.

[fol. 24] Q. Well, you never had seen him before?

A. I seen his face quite a few times on the street, but didn't know him that night.

Q. On the way home you said you decided you wanted to stop and get some liquor, is that right?

A. (No answer).

Q. You were riding along there with three teen age boys, you say, is thay right?

A. Supposed to be men at that time of day.

Q. You mean their ages go up at dark?

A. They were in a man's place.

Q. What?

A. They were in a man's place.

Q. With three teen age boys, you wanted all to chip in and you a grown man, and you and the three teen age boys were going to drink a little liquor, is that right?

A. I told them I did not want any; anybody else could get what they wanted after they taken me to the house.

Q. You had just had three beers and you do not like liquor much, do you?

A. Liquor is better for you than beer, two to one.

Q. And you were going to feed these teen age boys liquor?

A. No, I won't, I did not even give them a beer.

Q. I say you were going to get the liquor and let them help you, weren't you?

A. They wanted me to get it for them but I did not.

[fol. 25] Q. You were going to, though, weren't you?

A. No, sir. If I got any——

Q. Why weren't you?

A. They were too young to drink.

Q. Too young to drink?

A. Right.

Q. So then you ride on out the road, is that right?

A. Right.

Q. Did you have any conversation going out there?

A. Not worth telling.

Q. Not worth telling?

A. No.

Q. When you got out there, you were feeling pretty good then?

A. Well, I didn't have no headache, sir.

Q. Well, you were just sort of rolling along, weren't you?

A. No, I was sitting, riding along like a fool.

Q. You were in one or two clouds, weren't you?

A. I knowed everything going on all right.

Q. But you weren't particularly concerned about it, were you?

A. Well, won't no use to be after they had me.

Q. You told the boys you weren't going to pay them anything for taking you home, didn't you?

A. No, sir, I did not tell them that.

[fol. 26] Q. You didn't?

A. I don't remember telling them that.

Q. Didn't you turn around and come back to Fayetteville with them?

A. I don't think they turned around but one time after I got in the car.

Q. You were with them when they turned around and came back to the liquor store, weren't you?

A. I didn't go to no liquor store.

Q. And that is when you refused to get out and chip in on the bottle?

A. No, I give the boys the dollar like he asked, to take me home. I said you can buy candy or ice cream with it.

Q. Or liquor?

A. If he wanted to it was his business, not mine.

Q. And the car started out in the country, is that right?

How far did you get from where you lived when you say you stopped?

A. I say half way from the Old Market House home.

Q. You were pretty close to home, weren't you?

A. Out of the city limits.

Q. And you were so drunk you wouldn't get out of the car, would you?

A. I never refused to get out of the car; I did not refuse.

Q. You weren't scared?

A. No.

[fol. 27] Q. You weren't upset?

A. Not a bit in the world.

Q. Didn't anybody poke a gun in your face?

A. No.

Q. Didn't anybody pull a knife on you?

A. No, sir.

Q. Didn't anybody have a weapon?

A. No, sir.

Q. And all of a sudden, you find you haven't got your billfold, is that right?

A. I did not find out, I seen him when he taken it out of my pocket when my hands were up straight.

Q. Did you say, "Son, don't take my money"?

A. No, sir, I let him go ahead.

Q. You didn't tell him, "Son, don't take my money," did you?

A. It wouldn't have done any good.

Q. You didn't say, "You ought not to take my money," did you?

A. I did not say a word.

Q. You didn't say a single word?

A. That is right.

Q. Nobody used any force or violence on you?

A. Just open hand.

Q. Nobody used any force or violence and you weren't put in fear and you weren't intimidated at all, were you? [fol. 28] You weren't put in fear, were you?

A. No, sir, not frightened, but——.

Q. There was nothing to be frightened about and then you say the boys kept circling around there until around 10:00 o'clock, is that right?

A. Yes, sir, just kept circling.

Q. Just riding around?

A. Yes, sir.

Q. Did you ever say, "Boys, how about taking me on back home"?

A. No, I won't that hard up to get home.

Q. About what time of night was that, 10:00 o'clock?

A. Yes, sir.

Q. How come you didn't walk on home?

A. I come out of the woods where they left me, over there on the road, over there where they left me, out to the four-lane drive to go home.

Q. And you are sure that around 10:00 o'clock or so, that automobile you had been in was still riding around out there?

A. No, sir, it was stuck. When I hit the road they were sitting on the corner, parked in the sand.

Q. Why didn't you get a car and come down and get an officer and go out and get the boys right then and there that had robbed you, you say?

A. They got away before I could get a way to town.

Q. What?

[fol. 29] A. They got the car out and left before I could get a car to town.

Q. Were you standing there looking at it?

A. Yes, sir.

Q. How long did it take to get the car out of the sand?

A. By my watch it was 9:45, and they were rolling and rocking it in the dead sand.

Q. And you were standing there and the boys were rolling and rocking the car in the sand?

A. Yes, sir.

Q. You didn't go near them or get a car and go for the sheriff, just stood watching them for fifteen minutes or so, is that right?

A. I was standing there slowly thinking.

Q. Slowly thinking?

A. Yes, sir.

Q. Have you thought it all out yet, Mr. Spell?

A. I have thought too much in one way and in another not enough.

Q. Now, Mr. Spell, you went on home then, didn't you?

A. Yes, sir.

Q. You went on in and went to sleep, didn't you?

A. Yes, sir.

Q. Tried to, I didn't sleep very much that night. I figured they needed it worse than I did.

Q. You didn't even come to see any law enforcement [fol. 30] officer, sheriff or anybody else until sometime the next day, did you?

A. I caught the first bus coming to town the next morning, twenty minutes to ten, and came in and reported it.

Redirect examination.

Questions by State (Assistant Solicitor Blackwell):

Q. Mr. Spell, the boy that took your wallet from you, why did you let him take it?

A. I couldn't help myself, with my arms straight up like that and one standing behind to help him if I give any trouble.

Further cross-examination.

Questions by defendant Larry Hudson:

Q. Don't you know that the Flamingo Bar has been closed about three months, the bar you claim you were in?

A. The second one was open when I come by.

Q. When you walked by the Flamingo Bar this morning, you say it was open?

A. The second store from the old Market House was.

Q. You said the Flamingo Bar.

A. The second bar place from the old Market House, I did not know the name.

Q. Didn't you say awhile ago it was the Flamingo Bar?

Solicitor Blackwell: I think he said that.

A. The second door; you can go and see.

Questions by Attorney McGeachy:

Q. Mr. Spell, were you tried and convicted right across the hall here for hitting Roy Soles in the head with an axe? [fol. 31] A. Sir?

Q. I said, weren't you tried and convicted right across the hall here for hitting Roy Soles in the head with an axe?

A. I was tried but this is the first time of me knowing about an axe. Yes, I was tried for hitting him but I didn't hit him with no axe.

Q. What were you convicted of hitting him with?

A. I hit him with my fist.

Q. What were you convicted of hitting him with?

A. I don't remember right now.

Q. You didn't tell us about that when I asked you what you had been convicted of, did you?

A. No, sir, we didn't get into it.

Q. Let's get into it right now. Now what else have you been convicted of?

A. I guess that is all. I guess that is all I can place.

Q. Have you ever been up to Dix Hill?

A. Yes, sir.

A. How long were you up there?

A. Eighteen months.

Q. Didn't you testify in Recorder's Court that you thought you had or had not seen the boy Larry Hudson before?

A. No, sir.

Q. What, sir?

A. No, sir.

Q. Do you say you have ever seen this boy Larry Hud-
[fol. 32] son before the night in question?

A. He is the one done the robbing.

Q. I know he did, Mr. Spell. I am asking before that time had you ever seen him any time before then?

A. Nothing only just walking around on the street.

Q. Had you ever spoken to him before then?

A. No, sir.

Q. Had you ever seen him before then to notice him?

A. Just saw him on the street walking.

Questions continued by Larry Hudson:

Q. Do you remember what kind of clothes the defendant had on, the one supposed to have robbed you?

A. Sir?

Q. Do you remember the kind of clothes the defendant had on, the one supposed to have robbed you?

A. I did not examine them.

Q. Do you know what they looked like?

A. The automobile didn't have no light on or nothing when you all drove off and left.

A. If you didn't see the kind of clothes, how can you say it was us or me?

A. You had on a blue check shirt, kind of like a checker board, that night.

Q. Are you sure?

A. Yes, sir.

Q. You got up in Recorder's Court and said that you [fol. 33] thought you had seen me somewhere before but you won't sure.

Objection by State.

Court: You may ask him the question if he did that.

Questions continued by Larry Hudson:

Q. Didn't you say you thought you had seen me somewhere before but you weren't sure? You were under oath over there and you are under oath now. Answer my question.

A. I guess I did say it. Now I studied over that.

Q. That is what you said?

A. Yes, sir.

Q. This is my home, Mr. Spell——

Objection by State.

Court: Ask him any questions you want to, but be sure they are questions. I am not trying to cut you off; go ahead and ask him any questions you want to ask, but so far as testifying, you have to take the stand to do that.

Questions by Ray Starling:

Q. You say we were out there until about ten o'clock?

A. Yes.

Q. And when did we get stuck?

A. Absolutely, you stalled in dead sand on the curve.

Q. What time was it when we got stuck?

A. I wasn't quite out to the road and it was a quarter to ten and I looked at you fifteen minutes.

Q. What time was it?

A. Quarter to ten by my watch.

[fol. 34] ELMER ARNETT, a witness for the state, being first duly sworn, testified as follows:

Direct examination.

Questions by State (Assistant Solicitor Blackwell):

Q. You are Mr. Elmer Arnett?

A. Yes, sir.

Q. And you are a deputy sheriff of this county?

A. Yes, sir.

Q. Mr. Arnett, how long have you been in law enforcement in this county?

A. Around twenty-five years, or better.

Q. Were you acting in your capacity as law enforcement officer about the 14th day of February, 1958?

A. Yes, sir, but I was off duty that day.

Q. Did you have occasion to investigate this particular case, Mr. Spell has related from the stand?

A. Yes, sir.

Q. Did you talk with Mr. Spell about this case?

A. Yes, sir, I did.

Q. Will you relate what Mr. Spell told you about this particular case?

A. Yes, sir.

Court: Gentlemen of the Jury, this testimony about to be offered by the officer as to what the witness Mr. W. G. Spell, who testified on the stand, told him, is offered only and exclusively for the purpose of corroboration of the [fol. 35] witness Spell, who has already testified, if you find that it does corroborate him and for no other purpose. All right, go ahead.

A. Yes, sir, I did.

Q. Go ahead and relate what he told you?

A. I talked with Mr. Spell on the morning of the 17th.

Q. What day was that on?
A. On Monday.
Q. All right, go ahead.
A. The 17th of February. Mr. Spell, he stated that on February 14, about 7:00 or 7:30 p.m., he met the boy at the Cash & Carry Store on Gillespie Street.

Attorney McGeachy: Objection to that, because it does not in any way corroborate any statement made by Mr. Spell.

Court: He hasn't finished yet. I don't know whether it will corroborate him or not. When he finishes telling everything that was said, if it does not, I will so instruct the jury. Go ahead.

A. Mr. Spell stated he was going home and one of the boys asked him was he going home, which was a Grimsley boy, we later found out——

Objection by defendants, sustained.

Court: Sustained as to that. Now Mr. Sheriff, go ahead and tell just what the witness told you as near as you can. Of course do not consider that last statement in any way, Ladies and Gentlemen of the Jury. Go ahead.

A. He stated that he lived approximately at the intersec-
[fol. 36] tion of the Chicken Road on 301 South and that the boy told him he would take him home for one dollar. The boys got into the 1953 light blue car and started on 301 South, where they got to the East Mountain Drive. They went down it and stopped and one asked him to get out of the car and Spell asked what did he mean and one said, "Give us your money." He got out of the car and his bill-folder, which had $24.85, then taken it off from inside his coat pocket, one of the boys. He stated that after the car left, he stood in the edge of the woods and they passed several times before he left the scene of the woods. He said he was scared they would come back and try to do him bodily harm.

Q. Now Mr. Arnett, did he give you the license plate number?
A. Yes, sir, he did.
Q. Do you know what that number is now?
A. Yes, sir, I have it.

Q. Well, Mr. Arnett, did you find out whose car that license plate was on?

A. Yes, sir.

Q. Whose car was it on?

Objection by defendants.

Court: It would depend on how he found it out, I suppose.

Solicitor Blackwell: I asked if he did find out.

Court: You can ask whether or not he found out. The next question, I do not know. Go ahead.

[fol. 37] A. Yes, I did.

Q. As result of anything that you did find out, what did you do, Mr. Arnett?

A. Well, myself and Mr. Snipes went over on 301-A North, and talked to David Cain at his house on Monday.

Q. Now, when you say David Cain, who do you mean?

A. That is the boy sitting right next to Mr. McGeachy.

Q. All right, go ahead.

A. He stated that—he was warned of his rights, to get the record straight.

Attorney McGeachy: I object in behalf of the other boys to any statements by David Cain.

Court: Members of the Jury, do not consider this testimony if it has to do with any conversation between the deputy sheriff, Mr. Arnett and the defendant David Cain, do not consider that as against the co-defendants; I overrule it only as against the defendant Cain, if you find it is against him.

Questions continued by Attorney Blackwell:

Q. What statement, if any, did he make to you?

A. He stated that he had not been with no one at no time concerned the robbery. We talked to him for some little bit and we left. We later secured the license number of the car, which a note was left in my box. We went back, Officer Snipes and myself and talked to David Cain at his house, warned him of his rights, and also while we were there we checked his license, which was issued to a 1953 Ford, XP [fol. 38] 589, Then he made a statement he was the driver of the car.

Q. You say the driver of the car, go ahead and describe to the jury what you mean?

A. He was driving the car which left Gillespie Street, with four boys in it.

Q. What did he say happened after he said he was the driver?

A. He stated that he asked Mr. Spell when he saw him, was he going home and he stated he was and he said he would carry him home for one dollar.

Q. That is David Cain you are talking about?

A. Yes, sir.

Q. All right, go ahead and tell us what he told you?

A. He got in the back of the car, and there was three more boys.

Q. Did he name them?

A. No, sir, well, he did later on, yes, sir.

Q. Who were the other three boys in the car?

A. It was Larry Hudson, Ray Starling and Rubin Grimsley, which is a juvenile, which is now turned over to the juvenile authorities.

Q. All right.

A. Myself and Mr. Snipes brought him and the Grimsley boy up, which the Grimsley boy admitted the same thing in the office.

Objection by defendants.

Court: Objection sustained. Do not consider that state-
[fol. 39] ment at all, Gentlemen of the Jury.

A. We did not talk to Larry Hudson or either Ray Starling. They were picked up that night and we talked to them the following day. The following day we talked with Larry Hudson in the office. He denied everything, denied knowing anything at all about it. We told him well, we would take him up and face Ray Starling. He said he had a way of knowing that Ray wasn't in jail; he was up on the fourth floor and he had a way of contact through the trustees and we told him we would go up and see. We carried him on the third floor and he went back to the cell which he was at.

Q. Who was that?

A. That was Ray Starling, where he was at. We asked Ray about it.

Attorney McGeachy: Objection to all this as far as David Cain is concerned. (Sustained.)

A. It was in the presence of Larry Hudson.

Court: As to the defendant David Cain, do not consider this testimony, Members of the Jury.

A. I asked the question, which one got the pocketbook. Ray Starling told me that he was the one got the pocketbook himself, out of Mr. Spell's inside coat pocket. Larry Hudson said, I mean there was a little question there between them and Starling said, "Well, Larry, you know you were the one climbed over the back seat. You didn't get the pocketbook, but you told the man to step out." We [fol. 40] told him, "Well, let's go back upstairs." Larry looked at Ray Starling and told him, says, "Ray, when you see the damn law, you tell him you don't know nothing in the world about this or never have heard nothing." And I said, "I appreciate that very much, Larry."

Q. Now, Mr. Arnett, at the time you questioned David Cain, did you go into detail in his statement, as to how this thing took place?

A. Yes, sir. David told me they were going to start to go out there to take the man home and why he did it he didn't know, said he turned off there, said he was sorry he done it and when it was all over with there was a little difference in the amount of money that was gone. David and the Grimsley boy made a statement it was only two dollars and ninety cents. Ray Starling and Hudson, while we were questioning them, they made a statement that it was approximately four dollars in money.

Q. Did either one of the three boys ever state to you what happened to the wallet?

A. No, sir, that was when we were working very hard to try to find out where the wallet went, one, I believe the Cain boy told me at the time we were questioning him, that he was under the opinion that Larry Hudson is the one that had the pocketbook and throwed it out on the right of the road coming in towards Fayetteville, on a by-pass.

Objection by defendant Larry Hudson; sustained.

Court: Yes, I do not believe that would be competent [fol. 41] evidence. Strike that from your consideration.

Questions continued by Attorney Blackwell:

Q. Mr. Arnett, did either one or all three of these boys give you any statement as to the condition of Mr. Spell at the time they saw him?

A. Well, sir, they all said that—I believe they had been around there when he was drinking. Some of them stated that they had been drinking some beer, too.

Q. On this same night?

A. Yes, sir.

Q. What did they say was his condition at the time he got in the car this particular night?

A. No, sir, the only thing, they just said he had been drinking before they picked him up.

Cross-examination.

Questions by Attorney McGeachy.

Q. Mr. Arnett, do you know whether or not anything was said about turning around and coming back to buy some whisky?

A. Not to me, no, sir.

Q. Did you hear that statement made to anybody?

A. I am not positive, seems like that statement came out in Recorder's Court, something like that and I heard it just up here.

Attorney McGeachy: No further questions by David Cain.

Court: Larry Hudson, do you have any questions?

Defendant Hudson: No, sir.

[fol. 42] Court: Ray Starling, do you have any?

Defendant Starling: No, sir.

Questions by Court:

Q. Mr. Arnett, I did not get the name of the other boy the defendant Cain was with?

A. Rubin Grimsley, I believe.

Q. Grimsley?

A. Yes, sir?

Q. In your investigation did you arrest Rubin Grimsley?

A. Well, sir, we picked him up and questioned him and made out a complaint and turned him over to the juvenile

court, which he is supposed to be before Mr. Williams' office Friday.

Q. He is below sixteen?

A. Yes, sir, he is fifteen.

Q. What amount of money did Cain tell you was taken?

A. Two dollars and ninety cents; there was a little difference in there, in different statements.

The witness is excused.

J. D. SNIPES, a witness for the State, being first duly sworn, tsetified as follows:

Direct examination.

Questions by State (Attorney Blackwell):

Q. You are Mr. J. D. Snipes, Deputy Sheriff of Cumberland County?

A. Yes, sir.

[fol. 43] Q. I believe that is your day off? It is not?

A. Yes, sir.

Q. Mr. Snipes, did you and Mr. Arnett work together investigating this case?

A. We did.

Q. In the process of your investigation, did you have occasion to talk to David Cain?

A. We did.

Q. Go ahead and relate to the jury what he told you?

A. We checked by David's house in the morning part, somewhere between nine and twelve o'clock. We saw the automobile sitting there. We pulled in and asked for David; he came out and got in the car. We talked to him concerning the case. He denied knowing anything about it or hearing anything about it. We told David that if things proved out, we would be back. In the afternoon me and Mr. Arnett went back to David's. He come out and got in the car and we talked to him. He wholeheartedly admitted it.

Objection by defendant David Cain.

Court: Just tell what he said. Gentlemen of the Jury, here again you must not consider the statement of the defendant Cain as against the other defendants in the case because they were not present when the statement was made and had no opportunity to deny it or say anything about it.

so do not consider it against the other defendants. Go ahead.

A. He admitted being in town that particular night that [fol. 44] it occurred and with him was Larry Hudson, Ray Starling and the Grimsley boy. They picked Mr. Spell up to carry him home for a dollar. On the way out somebody suggested getting a pint; they turned around and came back, pulled into Person Street and stopped, but they did not buy any whisky. The turned around and went out 301 South, got below the Board of Education Building and they turned to the left on the dirt road and went back into the woods and in the meantime Larry Hudson crawled from the front of the car to the back seat. Ray Starling was setting in the back with Mr. Spell at the time. And when they stopped, they got out of the car and Mr. Spell had his hands up above his head; they frisked him down and drove off and left him. He said he got approximately a dollar and ninety cents. The following day when we came in the night boys had picked up Larry Hudson and Ray Starling. We talked to Ray Starling. He admitted being with them.

Objection by defendants.

Court: Strike that; that is not proper. Members of the Jury, here again, you will consider this evidence against the defendant who is making the statement only and any other defendant, not in his presence, you cannot consider this testimony against him. Were either of the other defendants present?

A. Ray was by himself.

Court: Consider it only as against Ray Starling.

A. He admitted being with them and stated about the same as I have told. We carried him back up to the cell, [fol. 45] got Larry Hudson and brought him down. Larry denied it. We told him we would carry him up and let Starling face him. We talked to Starling further and we carried Larry back up to the cell and faced him in front of Larry and Starling told Larry, "You might as well go ahead and admit it; they have us." And Larry said, "The best damn thing you can do when you get in the court room is tell that d— judge nothing."

Objection by defendant Cain.

Court: Do not consider this testimony against the defendant Cain. Go ahead.

A. And so Mr. Arnett spoke up and said, "I appreciate your saying that." And we carried Larry on upstairs and locked him up.

Cross-examination.

Questions by Attorney McGeachy:

Q. Mr. Snipes, they did tell you that the turned around and came back for Spell to buy some whisky at the whisky store?

A. They didn't say Spell; they said they turned around and came back to get a pint.

Q. Well, Spell was in the automobile at that time, they said, wasn't he?

A. Yes, sir.

Q. They said they came back to the liquor store and stopped, didn't they?

A. Yes, sir.

[fol. 46] Q. Now, did they tell you how much Spell had been drinking?

A. No, sir.

Q. Did your investigation disclose how much Spell had been drinking that night and what condition, whether or not he was intoxicated?

A. No, sir, the question arose as to drinking beer and nobody made any statement at all as to the amount, the condition he was in or anything.

Court: How about the defendant Hudson, do you want to ask the witness any questions?

Defendant Hudson: No questions.

Court: The defendant Starling?

Defendant Starling: No questions.

The witness is excused.

RUBIN GRIMSLEY, being called as a witness for the state, declined to testify.

Court: That is entirely up to you.

The state rests.

MOTION TO DISMISS AND DENIAL THEREOF

Attorney McGeachy: I would like to move, at the close of the State's evidence, that the case be dismissed; (motion overruled), exception.

Attorney McGeachy: There is no evidence for the defendant Cain.

Larry Hudson: I would like to take the stand.

[fol. 47] Attorney McGeachy: At this time, on behalf of the defendant David Cain, we tender to the state a plea of guilty of larceny, in such amount that it is a misdemeanor.

Attorney Blackwell: That is acceptable to the state.

Court: Proceed with the other defendants.

RAY STARLING, being duly sworn, testified as a witness for himself as follows:

Attorney Blackwell: All right, go ahead and make any statement about this thing you want to.

A. The night of February 14, me and Larry and David and Rubin Grimsley were riding around drinking and about 7:30 we picked Mr. Spell up and were going to take him home and went by the liquor store and got a pint of vodka. He paid for it and counted the change out in Larry's hands. We left the liquor store and stopped down here to the Texaco Station on 301 South and got some chasers. We drunk that pint and we went on and turned on this dirt road. Mr. Spell started puking all over the car and we told him he had to get out and when he got out, we left and me and Larry got in the back seat and David and Rubin were in the front seat and before we got out to the highway, I found this billfold and I opened it up and there was nothing in it and Larry suggested that we go back and give it to him and we went back and didn't see him nowhere and so we got out and hollered for him and he wouldn't answer and so we went over to the Cross Creek Court Recreation Center and it was about eight [fol. 48] o'clock and I was pretty drunk and the deputy on

duty over there told David and them to take me home between eight and eight-thirty.

Court: Is that all?

A. Yes, sir.

Court: All right, examine the witness.

Cross-examination.

Questions by state (Attorney Blackwell):

Q. Now Ray, you have just got off the roads, have you not?

A. Right.

Q. What was that for?

A. A check.

Q. A bad check?

A. Yes, sir.

Q. Where was that?

A. Florida.

Q. What else have you been on the roads for?

A. I don't know what it was for, but they had me for drinking, drunk and carrying a concealed weapon and I don't know which one they give me time on.

Q. You were convicted of that, though, were you?

A. Yes, sir.

Q. And you have been convicted of being drunk in 1953, weren't you?

A. Right.

Q. How old are you now?

[fol. 49] A. Twenty-three.

Q. Now, you were convicted in Wilmington, were you not?

A. Yes, sir.

Q. What was that for?

A. Larceny.

Q. Were you convicted in Elizabethtown?

A. I don't think so.

Q. You don't think so; you do not remember?

A. I remember being tried but I don't know whether I was convicted.

Q. In other words, you have been in a court so much you don't know when they turn you loose or when they convict you?

A. I do.

Q. Did they convict you in Elizabethtown, or didn't they?

A. I think they give me a suspended sentence.

Q. They did convict you, then?

A. I wouldn't swear to it.

Q. Now, on this particular night in question, you say you had been drinking?

A. Right.

Q. Had Larry Hudson been drinking?

A. Yes, sir.

Q. Had David Cain been drinking?

A. Not much.

Q. But Larry had?

A. Maybe he had taken a couple of drinks.

[fol. 50] Q. And you did that before you got up with Mr. Spell, didn't you?

A. Yes, we have some to drink before we got up with him.

Q. In other words, it wasn't Mr. Spell's idea for you all to go out drinking?

A. No, he offered to buy us a pint.

Q. Did he buy you a pint?

A. Bought us altogether one.

Q. Bought it altogether?

A. Yes, sir.

Q. He paid for it with his money?

A. Yes, sir.

Q. You did not pay for anything?

A. No, not after we got up with him.

Q. And Larry didn't pay for anything?

A. No, sir.

Q. And David Cain didn't pay for anything?

A. No, sir.

Q. All the money used after you picked up Mr. Spell was Mr. Spell's money?

A. Maybe a chaser.

Q. How much did you all drink after you picked up Mr. spell?

A. That pint of vodka.

Q. And you say you did go out to 301 with these boys and Mr. Spell?

[fol. 51] A. Right.

Q. And did you go off by the Highway Patrol camp?

A. I don't know where it was.
Q. Out in that vicinity?
A. I guess so.
Q. And you say Mr. Spell got sick?
A. Right.
Q. And that is the time that he lost his billfold, is that right?
A. I didn't say that.
Q. Isn't that the time he lost it?
A. He lost it in the car, yes.
Q. Lost it in the car?
A. Yes, sir.
Q. How much money was in it?
A. None.
Q. What did you do with the wallet?
A. I throwed it away.
Q. Threw it away; you did not keep it to give it back?
A. We went back to look for him.
Q. How many times did you look for him?
A. Twice.
Q. Did you see him?
A. We went back to see if we could see him and we called and he wouldn't answer.
Q. Now, you told Mr. Arnett and Mr. Snipes that you [fol. 52] had taken the wallet, didn't you?
A. No, sir.
Q. Now, you heard Mr. Arnett and Mr. Snipes testify?
A. I did.
Q. And you say you did not tell them that?
A. I did not tell them that, no, sir.
Q. And did Larry Hudson in your presence make the statement that the officers said he did?
A. No.
Q. He didn't make that statement. Any of the things the officers got up on the stand this morning and testified to, as to the statement that you made—did you make a statement to them?
A. Yes, sir, I told them I found the billfold and told them I throwed it out.
Q. And after you told them that, that you found it and threw it out, they arrested you for robbery of Mr. Spell, is that right?

A. That is right.

Q. Where did you throw the billfold?

A. Somewhere on 301, somewhere the other side of the underpass.

Q. Where did you find the wallet?

A. In the back seat.

Q. Just loose on the seat?

A. Yes, sir, down in it, almost went behind the seat.

[fol. 53] Q. When Mr. Spell got sick, did you get out of the car?

A. We all got out.

Q. You all got out of the car. What did you say to Mr. Spell after you got out of the car?

A. I don't remember.

Q. What did he say to you?

A. I don't remember.

Q. Did he have his hands above his head?

A. No, sir.

Q. Did you ever tell him that you wanted his money?

A. No, sir.

Q. Never said anything to him at all?

A. Only when we got the liquor.

Q. And that was all that was said to him all evening?

A. We talked.

Q. How long did you remain outside of the car?

A. Well, he got out. He fell down on the ground and we got back in the car and left.

Q. You left him there?

A. That is right.

Q. In other words, all you did was stop long enough to put him out?

A. No, we went to the bath room.

Q. Relieved yourself?

A. (No answer).

Q. And you just stopped long enough for that and got [fol. 54] back in the car and left him there?

A. That is right.

Q. Why did you leave him there?

A. He was drunk and puking all over the car.

Q. Were you drunk?

A. Yes, sir.

Q. Why didn't you get out and stay?

A. Well, when I puked on the car, they took me home, too.

The witness is excused.

LARRY HUDSON, being first duly sworn as a witness for himself testified as follows:

On this certain Friday night, I do not know what the date of it was, about 6:00 o'clock, I was in the D & W Soda Shop on the corner. I was in there drinking a Coca Cola and David Cain and Ray Starling and Rubin Grimsley come in. They sat down and drunked a Coca Cola and they got up and started to leave and Ray asked me, said, "You want to go with us, Larry?" I said, "Where you going?" And he said, "We are going to get something to drink," and I said, "Well," I says, "I might as well; I ain't got nothing else to do." We went and got a pint of vodka and we drank that and we come back down, me, Ray Starling and and David Cain. We went into the Aster Bar, went into a rest room. Mr. Spell was in there. He was in the bath room in the Aster Bar. When we come out, he come out [fol. 55] with us and David, I mean Ray Starling asked him where he was going and he said he was going home. He said, "We will take you home." He asked him did he want him to take him home and he said, "yes", so they all went and got in the car and I come on to the car in a few minutes and got in and I spoke to somebody on the street that I knew. And somebody asked him did he have enough for a pint and he said yes, he would like to have a drink and he counted it out, the money, to me and I was in the front seat and I reached around. He counted out the money to me to buy a pint of vodka and it was two dollars and something; I don't know exactly how much it was. I give it to Ray Starling and he went in and got it, come back to the car and we started out 301 towards his house. We stopped at Pope's Texacco Station and bought two Coca Colas for chasers. Mr. Spell, he got sick and started throwing up all over the back seat of the car and David Cain, the the boy that the car belonged to, he got mad because he was messing his car up and said he was going to put him out. Somebody said, "Well, take him off the road; he is so drunk he can't stand up; he might stand up there and get run

over," and so we drove off the road and put him out. All of us got out and went to the bath room, and we got back in the car and left. When we got out on the highway, Starling said, "I found his billfold back here," and he threw it out, won't nothing in it. I said, "Well, let's take it back to him." So he turned the car around, the Cain boy did, and went back and we looked for him and we didn't see him [fol. 56] no place along the road. We got out where we let him out and hollered for him; he did not answer; so we figured he had staggered off somewhere down in the woods and passed out. So we left and Starling threw his billfold out of the car and they took me over to Cross Creek Recreation and left me. That was about eight o'clock. That is it.

Cross-examination.

Question by Attorney Blackwell:

Q. How old are you, Larry?

A. Eighteen.

Q. How many times have you been convicted in your life, of anything?

A. I have been convicted of breaking and entering, one time. I was convicted of driving under the influence of liquor last court.

Q. What else?

A. That is all.

Q. Now were you convicted of assault and disorderly conduct in 1958?

A. No, I am not.

Q. Were you convicted of a simple assault?

A. I was convicted of simple assault but I appealed.

Q. Is that in this court at this time?

A. Yes, I guess so.

Q. What else have you been convicted of?

A. That is all.

[fol. 57] Q. You were convicted of careless and reckless driving?

A. Yes, I was convicted of careless and reckless driving in 1958.

Q. And on the breaking and entering charge, you were sent to training school, weren't you?

A. I was sent to prison.

Q. Sent to prison?

A. Yes.

Q. When did you enter Eastern Carolina Training School?

A. When they sent me to prison, the sentence provided I would go up there of my own free will.

Q. Did you go?

A. Yes, sir, I did.

Q. How long did you stay?

A. Five days.

Q. You escaped, didn't you, after five days?

A. I left.

Q. They caught you, didn't they?

A. Yes, they did.

Q. You escaped again?

A. Yes, I did.

Q. And you say on this night in question you did not take this man's money?

A. No, I didn't.

Q. His wallet was lying in the back seat?

A. Yes, sir, it was.

[fol. 58] Q. And you say that you crawled over from the front seat to the back seat during the riding of the evening?

A. No, I didn't say that.

Q. Well, did you?

A. Yes, I did.

Q. When did you do that?

A. That was after we went and got the liquor. The Cain boy said, "How about climbing over in the back seat so I have more room to drive?" There were three of us in the front and two in the back seat.

Q. And you did climb over?

A. Yes, I did.

Q. And you sat beside Mr. Spell?

A. Yes, sir, that is right.

Q. You got out in the woods when you stopped and put Mr. Spell out?

A. Yes, I did, when they all got out.

Q. All of you got out, did you?

A. Yes, sir.

Q. And Mr. Spell got sick?

A. Yes, he did.

Q. And you left him there?

A. Yes.

Q. But at no time while you were standing outside of the car, did you take his wallet?

A. No, I have not took his wallet and I do not think [fol. 59] nobody else has took it. If anybody has, I don't know nothing about it, if anybody has been robbed.

Q. What did you do with his wallet after you found it?

A. I did not find it.

Q. After it was found?

A. I didn't do nothing with it.

Q. What did you see done with it?

A. I seen it threw out the window.

Q. Who threw it out the window?

A. Ray Starling.

Q. The boy right here?

A. Yes.

Q. Who found it?

A. He did.

Q. Now, he was on the front seat?

A. No, he was on the back seat.

Q. Who was on the front?

A. David Cain and Rubin Grimsley.

Q. And that left you and Starling in the back seat with Mr. Spell?

A. Mr. Spell won't in the back seat when he found the billfold.

Q. He was before that, was he?

A. Yes.

Q. And you and Starling were with him at that time?

A. That is right.

[fol. 60] Q. And you say you threw the wallet—the wallet was thrown out the window?

A. Yes, sir.

Q. But before you did that, you went back to see if you could find Mr. Spell?

A. Yes, sir.

Q. But you did not find him?

A. No, sir.

Q. Did you go back in the woods and look for him?

A. No, we didn't go back up in the woods and look for him; it was dark out there.

Q. You went up there the first time, didn't you?

A. We got out and hollered at him.

Q. When you went up the first time, you carried Mr. Spell up there, it was dark, wasn't it?

A. Yes, sir.

Q. And you put him out?

A. He got out.

Q. You didn't let him back in?

A. He did not offer to get back in and it won't my car and I didn't have nothing to do with him getting back in or out.

Q. You don't know anything about the case at all except you found a wallet?

A. I was in the bunch. I don't know nothing about nobody being robbed, nobody ain't been hurt and nobody ain't [fol. 61] been robbed, as far as I know. We were all just out trying to have some fun.

Q. Drinking liquor?

A. Yes, sir.

Q. And you didn't tell Mr. Arnett in the presence of this fellow Starling, that the best thing for him to do was not to tell that d—— judge anything?

A. No, sir.

Q. You didn't make that statement to Starling in the presence of Mr. Arnett or Mr. Snipes?

A. No, sir.

Q. I ask you one more question, did not Starling tell you in the presence of Mr. Snipes and Mr. Arnett, that you were the one took the wallet?

A. No, he did not.

Q. He did not tell you that he, himself, was the one took it out of Mr. Spell's pocket?

A. No, he did not. He said he found the billfold.

The witness is excused.

The defendants Starling and Hudson were given an opportunity to argue their case to the jury.

The Court then charged the jury:

CHARGE TO JURY

Members of the Jury, in this case it is charged that on the fourteenth day of February of this year the defendants Larry Hudson and Ray Starling, did with force and arms, [fol. 62] at and in the county aforesaid, unlawfully, wilfully and feloniously rob and take $24.00 in U. S. Money from the person of W. G. Spell, the property of W. G. Spell, without his consent and against his will, by violence, intimidation and putting in fear, against the form of the statute in such case made and provided and against the peace and dignity of the State.

This bill of indictment charges these defendants now on trial with committing the crime known as common law robbery which is the felonious taking of money or goods of value from the person of another or in his presence against his will by violence or putting him in fear. An indictment for common law robbery will support a conviction of the lesser offense of larceny from the person if there is evidence of guilt of such lesser offense.

So in this case you may return one of three verdicts: 1. Guilty as charged, that is, of common law robbery, 2. guilty of larceny from the person or 3, not guilty.

The defendants are not charged with robbery with firearms, which is made a more serious crime by statute in this state.

Now to the charges contained in this bill of indictment both defendants have entered a plea of not guilty, and upon that plea, these defendants, as is true with any defendant [fol. 63] so pleading, are protected and surrounded by what is know in law as a presumption of innocence, which simply means that they are presumed to be innocent of any and all charges unless and until the State of North Carolina proves to the jury beyond a reasonable doubt that they are guilty, the burden being upon the state to prove the guilt of the accused, these defendants, beyond a reasonable doubt and not a case where the defendants must prove that they are innocent. And if the state, as the prosecuting

party in this case, has failed to satisfy you the jury of the guilt of these defendants of the crime charged, beyond a reasonable doubt, that is to say, if you have any reasonable doubt about it, you will give the defendants the benefit of the doubt and acquit them.

The Court wishes to give you certain instructions about how you will look upon the evidence in the case. The jury in the first place is the sole tryers of the facts. You, the jury are to remember all of the facts, all the testimony in the case, and you are to abide by your own recollection of the testimony in the case. If there is any conflict between your recollection and that of counsel or the Court in the charge, you the jury are the sole judges of the weight and credibility of the testimony and you alone can find the facts. So as the Court proceeds with the charge and refers to matters of evidence, it will be your duty to take your own recollection and not that of the Court in case there is a conflict between the two. If you remember the evidence differ- [fol. 64] ently from the Court, abide by your own recollection.

Now in this case, there is a sharp conflict in the testimony as to essential points in the case, and you must find what the facts are, and finding those facts apply them to the law as the Court will explain the law to be and in that way make up your verdict, which will speak the truth as to the guilt or innocence of these defendants.

Now obviously you cannot accept all of the testimony in the case as being true, however, you the jury are the sole judges of the weight and credibility of the testimony. You must take all of the testimony as you recall it and weigh it and compare it and arrive at what the true facts are.

Now you may believe all that a witness testifies to, or part of what a witness has testified to and disbelieve another part that a witness has testified to, or you may disbelieve everything a witness has testified to or you may believe everything he has testified to, in accordance with what you, the jury, decide about his credibility, that is, his worthiness of belief.

It is your duty, where the defendant has testified, to scrutinize his testimony carefully, because of his interest or bias in the outcome of this case, your verdict, and after you have carefully scrutinized his testimony in that light,

you still believe that he is telling the truth, that he is worthy of belief, then you will give to his testimony the same weight that you would the testimony of a disinterested [fol. 65] witness, and that of course applies to both defendants in this case, because both defendants have testified.

Now as to all witnesses, you must scrutinize their testimony in the light of any bias, if any, and their opportunity to see and observe the things that they have testified to. You may also consider the deportment and demeanor of the witness upon the stand in judging his worthiness of belief.

Now in this case the Court has defined the crime of common law robbery, the commission of which the defendants are charged in the bill of indictment, and there are two essential elements to the charge of common law robbery which must be proved by the State beyond a reasonable doubt and if it fails to so satisfy you of each and both elements, it would be your duty to acquit these defendants of the charge of common law robbery. The first is that these defendants did feloniously or dishonestly take money or property of W. G. Spell from the person of W. G. Spell, without his consent and against his will, and second that this was done by violence, intimidation and putting him in fear.

On the charge of larceny from the person, the state must satisfy you that the defendants did take from the person of W. G. Spell, without his consent, something of value, with fraudulent intent, that is, intent to permanently deprive W. G. Spell of his property and appropriate the same to their, the defendants', own use.

If the State has satisfied you from the evidence and beyond a reasonable doubt that the defendants, or either of them, did unlawfully, willfully and feloniously take money [fol. 66] from the prosecuting witness, Mr. Spell, without his consent, and against his will, by violence, intimidation and putting him in fear, then you would find that defendant guilty as charged of common law robbery.

If you find either of the defendants guilty of common law robbery and you further find beyond a reasonable doubt that the other defendant was present aiding and abetting, as the Court will define that term to you, the other in said robbery, it will be your duty to find that defendant equally guilty of common law robbery.

An aider and abettor is one who advises, counsels, procures or encourages another to commit the criminal act.

To aid and abet commission of crime, one must do something that will incite, encourage, or abet actual perpetrator in commission of crime.

Where two or more persons aid and abet each other in commission of a crime, all being present, all are principals and equally guilty.

If you fail to find the defendants or either of them guilty of common law robbery, then you will consider whether they are guilty of larceny from the person.

If you find that the defendants, or either of them, did unlawfully and wilfully take money from the person of W. G. Spell, without his consent and against his will and you find this beyond a reasonable doubt, then you will find those defendants or that defendant guilty of larceny from the person.

If you find one defendant guilty of larceny from the person and find further, beyond a reasonable doubt, that the other defendant was present, aiding and abetting, as the [fol. 67] Court has just defined that term to you, the other in the larceny from the person, then it will be your duty to find that defendant equally guilty of larceny from the person.

If you do not find the defendants, or either of them, guilty beyond a reasonable doubt of common law robbery, as the court has explained that to you and you do not find beyond a reasonable doubt the defendants, or either of them, guilty of larceny from the person, as the Court has explained that to you, then you will acquit the defendants, either or both of them, about which you do not so find, you will acquit them and return a verdict of not guilty.

The court is not going to reiterate to you all the testimony which came from the stand. I am sure you will recall it all, which is your duty.

The Court would like at this time to point out that if in recapitulating the evidence, giving any contention, or if in ruling on the evidence or by any act or mannerism, or words spoken by the Court, the Court has or should seem to indicate an opinion one way or the other as to the guilt or innocence of the defendants, please strike that from your mind. It is not the intent of the Court to indicate any opinion as to the guilt or innocence of these defendants.

That would be highly improper and against the law. The Court has not intended to do that in this case or in any case. As a matter of fact, the law is that the Court cannot even comment on the verdict of the jury after it is announced.

[fol. 68] The State has offered evidence which it contends tends to show that on the 14th of February, 1958, about the hour of seven o'clock, that W. G. Spell met some boys in a bar on Gillespie Street in close proximity to the Market House; that one Ray Starling offered to take him home for a dollar, to which he agreed. That as they were backing out to leave, the car being driven by a blond-headed boy unknown to him, the defendant Larry Hudson came running and got into the car with them; that there were four in the car altogether. That at that time he had consumed three beers; that after they got in the car, they went down to Liberty Point and that some of the occupants of the car wanted him to buy a pint of liquor but that he did not. That they left there and went South on 301 beyond the Patrol Station and took a left turn down a dirt road. That the car stopped; that Larry Hudson crawled from the front seat into the back and told him to get out and hold his hands straight up. They, all the occupants, got out of the car and that while the others stood around Larry Hudson removed his wallet and took therefrom a ten dollar bill, two fives and four one dollar bills and eighty-five cents in change; that he never got his wallet back. The defendants and the other occupants of the car got back in and left, leaving him in the woods, that the car circled around several times and got stuck in the sand. That of the occupants of the car he recognizes Ray Starling and Larry Hudson.

The witness testified on cross examination that he offered no resistance to the taking of his money and that he [fol. 69] was not put in fear but that he figured three men were better than one. The witness further testified that he had been convicted twice for public drunkenness. He further testified on cross examination that he had been paid $46.75 for his week's work and had come to town and paid ten dollars on one account and some other bills and purchased three glasses of beer at fifteen cents a glass. He later stated that he drew only $33.95 for his work that week; but that he put twenty-four dollars in the billfolder and buttoned the

pocket to take home. The witness further testified on cross examination that he had been convicted once for assault.

The State then offered the testimony of deputy sheriff Elmer Arnett, which it contends tends to show that Mr. Arnett talked with the witness Spell and Mr. Arnett related the conversation for the purpose of corroborating the witness Spell.

As the Court has already instructed you, this account of the conversation between the witnesses Mr. Arnett and Mr. Spell may be considered by you only insofar as it tends to corroborate the witness Spell, if you find it does so corroborate him; that part which does not corroborate the witness Spell, you will disregard.

The witness further testified that he talked with Larry Hudson and that Larry Hudson denied knowing anything about the charge; that he took the defendant Hudson into the presence of Ray Starling and that Ray Starling said in the presence of Larry Hudson that he, Ray Starling was the one got the pocketbook out of Mr. Spell's pocket but [fol. 70] that Larry Hudson was the one crawled over into the back seat and told Mr. Spell to get out.

The State then offered the testimony of Deputy Sheriff J. D. Snipes, which it contends tends to show that he investigated this charge and talked to Ray Starling and that Ray Starling admitted being with the other defendants and Mr. Spell on this occasion and that Ray Starling told Larry Hudson, "You might as well go ahead and admit it; they have us," but that Larry Hudson denied knowing anything about it.

At this time the State rested and the defendant Ray Starling testified in his own behalf that he, Larry, and Rubin Grimsley were riding around drinking on the date in question, February 14, and picked up Mr. Spell and were going to take him home; that they went by the liquor store and got a pint of vodka for which Mr. Spell paid. That they stopped, got chasers and drank that pint of vodka. That they went out on 301 South and turned off on a dirt road; that Mr. Spell got sick and started vomiting in the car and that they put him out and left him in the woods. That he and Larry were on the back seat and that he, Starling, found a billfold, opened it and there was nothing in it. That Larry suggested that they go back and give the billfold to

Mr. Spell and that they did go back and called to him but could not find him. That from there they left and went over to Cross Creek Court Recreation Center, arriving there about eight o'clock. That he was pretty drunk and the officer on duty there told David to take him home.

[fol. 71] On cross examination the defendant Starling stated that he had just recently gotten off the roads, having been convicted because of a worthless check; that he was convicted of being drunk in 1953; that he is now twenty-three years of age. That he was also convicted in Wilmington for larceny.

Then the defendant Larry Hudson, testified in his own behalf that on this night in question he was at the D & W Soda Shop drinking a Coca Cola and was joined by David Cain, Ray Starling and Rubin Grimsley. That he left with them to get something to drink; that they got a pint of vodka and drink it. That they went to the Aster Bar where they met Mr. Spell and that Ray Starling offered to take Mr. Spell home and they all got in the car and left; that Mr. Spell counted out two dollars and some odd cents to him and that he took this money and bought another pint of vodka. That later Mr. Spell got sick and started vomiting in the car and some one suggested that they put him out and that he suggested that they get him off the road first as he was in a drunken condition and might be run over on the highway. That after they left Mr. Spell in the woods that Ray Starling found his billfold in the back of the car. That they turned around and tried to find Mr. Spell in order to return the billfold but were unable to do so and there being nothing in the billfold that Ray Starling threw it out the window of the car.

On cross examination Larry Hudson testified that he is now eighteen years of age; that he has been convicted of [fol. 72] breaking and entering and went to East Carolina Training School of his own free will, from which he had escaped twice; that he had also been convicted of careless and reckless driving.

Upon this evidence the State contends that you should find each of these defendants guilty beyond a reasonable doubt, of common law robbery, that the witness Spell was invited into the automobile in order that they might take him out and rob him; that they carried Spell out into the

woods and there forced him out of the car and forced him to hold his hands above his head while one of them took from him his wallet, containing some amount of money, approximately twenty-four dollars, the others standing by aiding and abetting, and therefore, you should find that this money was taken from him without his consent and against his will, by violence, intimidation and putting him in fear and, therefore, that you should find each of them guilty beyond a reasonable doubt, of the charge of common law robbery.

The defendants and each of them on the other hand contend that you should not so find, that you should have a reasonable doubt and acquit them. They contend that they in no way harmed the witness Spell and that they did not take his money or billfold; that they put him out of the car because of his drunken condition and that after he left the car, his billfold, containing no money, was found in the car. That they were unable to return his billfold because they could not find him.

They, and each of them, therefore, contend that they are not guilty of any offense and that you should acquit them. [fol. 73] The State contends that if you should not find the defendants guilty beyond a reasonable doubt of common law robbery, that you should at least find them guilty of larceny from the person; that if you should find that they did not use any violence or intimidation and did not put the witness Spell in fear, that they at least took his money without his consent and against his will and that you should at least find each of the defendants guilty beyond a reasonable doubt of larceny from the person.

Each of the defendants on the other hand contend that they and neither of them took any money from the witness Spell and made no attempt to do so, and, therefore, that they are not guilty of anything and that you should so find and acquit them.

The Court instructs you that from this evidence you may find both defendants guilty of common law robbery, or you may acquit one and find the other guilty; that you may acquit both of common law robbery and find them guilty of larceny from the person or you may convict one of larceny from the person and acquit the other; or you may find both

of them not guilty, as you may find the facts to be from the evidence.

So the Court instructs you that if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendants Ray Starling and Larry Hudson, or either of them, the other being present aiding and abetting, as that term has been explained to you, did unlawfully, wilfully and feloniously rob and take any amount of money [fol. 74] from the person of W. G. Spell, the property of W. G. Spell, without his consent, and against his will, by violence, intimidation and putting him in fear, then you would return a verdict of guilty of the offense of common law robbery.

If you do not so find, then you will consider whether or not they or either of them is guilty of larceny from the person.

If the State has satisfied you from the evidence and beyond a reasonable doubt that the defendants Ray Starling and Larry Hudson, or either of them, the other being present aiding and abetting, did unlawfully and wilfully take any amount of money from the person of W. G. Spell, the property of W. G. Spell, without his consent and against his will, with the intent at the time of the taking of permanently depriving W. G. Spell of his property and appropriating the same to their own use, then you will find the defendants guilty of larceny from the person.

Take the case, Members of the Jury, and say how you find the defendant Ray Starling, guilty of common law robbery, guilty of larceny from the person or not guilty; and how you find the defendant Larry Hudson, guilty of common law robbery, guilty of larceny from the person or not guilty.

Take the case.

[fol. 75] Clerk's Certificate Omitted in Printing.

[fol. 76] IN THE SUPERIOR COURT OF CUMBERLAND COUNTY,
MARCH CRIMINAL TERM 1958

#10276 Assault and Robbery

STATE OF NORTH CAROLINA

vs.

DAVID CAIN, LARRY HUDSON, RAY STARLING

MINUTES OF MARCH 13, 1958

The defendant, David Cain by and through his counsel, Hector McGeachy, enters a plea of guilty of petty larceny, which plea is accepted by the State.

The defendants, Larry Hudson and Ray Starling, not being represented by counsel, enters a plea of Not guilty.

Whereupon the following good and lawful citizens of Cumberland County were chosen, sworn and empanelled as the jury in this case, to-wit:

Mrs. Andy Tola, William H. Knight, Mrs. Rossie V. Derby, Eula Mae Thames, James B. Wood, W. W. Hales, Carson Jackson, J. R. Beal, Arthur R. Skipper, H. J. Carter, Marie S. Adcox, W. H. Harrison.

At the close of the State's evidence, each defendant makes a motion to dismiss the case. Motion denied; defendants except.

After hearing all the evidence and the charge of the Court, the jury says for its verdict:

as to the defendant, Ray Starling, Guilty of Larceny from a person;

as to the defendant, Larry Hudson, Guilty of Larceny from a person;

Judgment was not entered this date and will be entered later.

At this hour 5:00 o'clock P.M. Thursday, March 13, 1958, the Court takes a recess until tomorrow morning, Friday, March 14, 1958, at 9:30 o'clock, A.M.

s/ Heman R. Clark, Honorable Judge Presiding.

IN THE SUPERIOR COURT OF CUMBERLAND COUNTY

MINUTES (including Judgment) OF MARCH 14, 1958

At this hour, 9:30 o'clock A.M., Friday, March 14, 1958, the Court reconvenes for the transaction of business in accordance with recess had on yesterday.

#10276 Assault and Robbery

STATE OF NORTH CAROLINA,

vs.

DAVID CAIN, LARRY HUDSON, RAY STARLING

Trial of this case was completed yesterday and judgment is entered this date.

[fol. 77] Now, therefore, judgment of the Court is that the defendant, David Cain, be confined in the common jail of Cumberland County and assigned to work upon the public roads of the State under the supervision of the N.C. Prison Commission for a period of six (6) months. Execution of the foregoing sentence is suspended upon condition that the defendant be placed on probation for a period of five (5) years under the supervision of the N. C. Probation Commission and its officers with the usual conditions of probation. Defendant is to pay the cost of court as taxed by the Clerk.

Judgment of the Court as to the defendant, Larry Hudson, is that the defendant be confined for a period of not less than three (3) nor more than five (5) years in the North Carolina State Prison, at Raleigh, N. C.

Judgment of the Court as to the defendant, Ray Starling, is that the defendant be confined in the common jail of Cumberland County and assigned to work upon the public roads of the State under the supervision of the N. C. Prison Commission for a period of not less than eighteen (18) months nor more than two (2) years.

At this hour 5:30 o'clock P.M., Friday, March 14, 1958, the Court adjourns Sine Die.

s/ Heman R. Clark, Honorable Presiding Judge.

[fol. 78] IN THE SUPERIOR COURT OF CUMBERLAND COUNTY

NOTICE OF APPEAL—Dated March 16, 1958

North Carolina Prison Department

Mr. Thomas Williams
Cumberland County House
Fayetteville, N. C.

835 West Morgan St.
Raleigh, North Carolina
March 16, 1958

DEAR SIR:

This is in regards to a recent conviction rendered down in Court. I refer to the case of assault and robbery—in which I was the convicted party. This case was tried upon the 13th day of March 1958.

As a result of this conviction I received a sentence of not less than 3 years nor more than five years. I would like to give notice for appeal to the State Supreme Court of North Carolina. And also ask that you consider this as such.

I did asked the court to appoint me a Counsel and the court refused to do so.

I was not represented by Counsel at any time during the proceeding mentioned above. I believe this to be a direct violation of my constitutional rights.

I ask sir that you take this under consideration. And doing so have me returned to Cumberland County, so that I can retain an attorney to defend me on this appeal. Also give me the due right to be placed under a date bond.

Respectfully yours, Larry Dayton Hudson.

State of NORTH CAROLINA, County of Wake on this 17th day of March 1958, personally appeared before me, the said named Larry Dayton Hudson to me known and known to me to be person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same, and being duly sworn by me, made oath that the statements are true.

Signature of Notary Public, L. R. Temple.
[Official Seal]

[fol. 79] IN THE SUPERIOR COURT OF CUMBERLAND COUNTY

STATE,

VS.

LARRY DAYTON HUDSON

ORDER RE-NOTICE OF APPEAL—APRIL 25, 1958

The defendant, at the March Term 1958 of Cumberland Superior Court, was convicted on a charge of Assault and Robbery, as will appear of record. He was sentenced by Judge Heman R. Clark to serve a term of not less than three (3) years nor more than five (5) years in the State Prison. The Court finds that within ten (10) days after the judgment was entered he filed notice of appeal to the Supreme Court in the Clerk's Office of Cumberland County; and that the Solicitor for the State has waived any irregularity arising by reason of his failing to serve any notice of his intention to appeal to the Supreme Court upon him.

It is, Therefore, Ordered by the Court that the defendant be permitted to perfect his appeal to the Supreme Court and it is further ordered that he have thirty (30) days from the date of this order to serve a statement of case on appeal upon the Solicitor for the State, and that the Solicitor shall have twenty (20) days thereafter to serve counter case, or exceptions, upon the defendant. It is further ordered that the defendant file an appeal bond in the sum of One Hundred ($100.00) Dollars, unless he does comply with the Statute permitting him to appeal without giving an appeal bond. It is further ordered that the defendant be permitted, upon his return to the jail in Cumberland County, to give an appearance bond as required in criminal cases where there is an appeal to the Supreme Court and the Court adjudges that an appearance bond of Twenty-Five Hundred Dollars is sufficient.

It Is Further Ordered that the Director of Prisons and the Warden of the State Prison be directed to deliver the [fol. 80] defendant, a prisoner now in the State Prison, to the Sheriff of Cumberland County, or his lawful Deputy, to the end that said Sheriff, or lawful Deputy, may bring said prisoner back to the common jail of Cumberland

County and, after he is so returned, it is ordered by the Court that he remain in jail pending his appeal to the Supreme Court, unless he gives an appearance bond in the sum of Twenty-Five Hundred Dollars, to be approved by the Clerk of the Superior Court of Cumberland County.

This the 25th day of April, 1958.

/s/ Leo Carr, Judge Presiding.

[fol. 81] IN THE SUPERIOR COURT, CUMBERLAND COUNTY, NORTH CAROLINA, JUNE TERM 1958

No. 10275

STATE

VS.

LARRY DAYTON HUDSON

ORDER DISMISSING APPEAL TO SUPREME COURT OF NORTH CAROLINA—June 26, 1958

In this action the Solicitor for the State of this the 26th day of June 1958 moves that the court adjudge that the defendant's appeal to the Supreme Court has been abandoned for that the defendant has not served the statement of case on appeal as required by the order of the Court and the Court finds as a fact that the record shows that the defendant had until the 24th day of June 1958 within which to prepare and serve statement of case on appeal on the Solicitor and that he has failed to serve said statement of case on Solicitor as prescribed by order of Court and by the appeal entries entered in this Court:

Therefore, upon motion of Solicitor it is ordered and adjudged that the defendant's appeal to the Supreme Court has been abandoned and it is further ordered that commitment issue forthwith and that the defendant be required to serve the sentence imposed by the Court in this action at the March Term 1958.

Leo Carr, Judge Presiding.

[fol. 82] IN THE SUPERIOR COURT OF CUMBERLAND COUNTY

North Carolina Prison Department
Fayetteville, N. C.

STATE OF NORTH CAROLINA, Respondent,

vs.

LARRY DAYTON HUDSON, Petitioner

PETITION FOR WRIT OF CERTIORARI

Now comes one Larry Dayton Hudson, known now and hereinafter to be called your petitioner.

Your petitioner requests that he be brought into your honorable court, to have a hearing on a writ of Certiorari. For the following reasons to wit:

Your petitioner was tried in the March 14, 1958, Criminal Term of Court, in Cumberland County, Fayetteville, North Carolina, for assault and robbery. And the Jury brought back in a verdict of guilty of larceny from a person. And the judgment of the court as to your petitioner was that he be confined for a period of not less than three nor more than five years in the North Carolina State Prison, at Raleigh, N. C. Your petitioner was took to the State Prison at Raleigh, N. C., March 14, 1958, to start his time. On March 16, 1958, your petitioner sented to the Clerk of Superior Court of Cumberland County, Notice of Appeal to the N. C. Supreme Court. And on April 26, 1958, he was took back to Cumberland County Jail to await the hearing of his trial in the Supreme Court of North Carolina. Your petitioner took a pauper's oath to perfect his appeal through [fol. 83] to the Supreme Court. On June 26, 1958, your petitioner was took to the Superior Court of Cumberland County to have a hearing on a Writ of Habeas Corpus, and his Honorable Judge Lee Carr told your petitioner that a Writ of Habeas Corpus could not be used while a person had an appeal in to the Supreme Court, and that he could not rule on it. And so he dismissed my Writ. And right after he dismissed my Writ, he dismissed my Appeal to the Supreme Court. And so my appeal never got to the Supreme Court. And your petitioner was brought back to

the State Prison at Raleigh, N. C., and his 3-5 years sentence was started all over again.

YOUR PETITIONER ASSERTS

I. That he is imprisoned in the state penitentiary in Raleigh, North Carolina, and I am being held in prison illegally, on the grounds that I was tried in criminal court for a felony without counsel, which I humbly begged the court for. In the transcript of my case in Court Page One is actual proof of this statement. In the Constitutional Amendments Article (VI) six specifically states that: In all criminal prosecutions the accused shall have the assistance of counsel for his defense.

II. Attorney McGeachy, did offer to defend your petitioner, free of charge. And the court refused to let him defend me.

III. Your petitioner further asserts that: The prosecut-
[fol. 84] ing witness did and make false statement to the court. Thereby intimidating both judge and jury.

IV. Your petitioner asserts that: The prosecuting witness, W. G. Spell, has been to a mental institution (Dix Hill, Raleigh, N. C.), and was kept as a mental patient for a period of eighteen (18) months. Your petitioner further contends that the prosecuting witness W. G. Spell's testimony is highly incompetent. And for his reason his testimony should not be accepted as evidence against your petitioner.

V. Your petitioner asserts that: The court did accept statements made by Deputy Sheriff Arnett and Deputy Sheriff J. D. Snipes that was made to them by the other two defendants while your petitioner was not there. Which is highly illegally.

VI. Your petitioner further asserts that: He was tried on two different cases that happen on the same night, at the same time, ten miles apart. And was convicted on both of them. Which is illegally because a man cannot be in two different places at the same time.

Your petitioner has in his possession the transcript of his case in court and the actual proof of the statements given above.

[fol. 85] Your petitioner is a poor man and pennyless and ask that he be permitted to prosecute this proceeding free of charge, as a pauper.

For the reasons given above your petitioner contends that his Constitutional Rights of the United States and of the State of North Carolina has been violated. And he contends that for these reasons he should be released from prison, and that he be granted a new trial.

I set my hand and sign this 8th day of August Nineteen-hundred and fifty-eight in the year of our Lord.

Respectfully yours, Larry Dayton Hudson.

Amendment. Petitioner, with leave of court requests that counsel be appointed for him to conduct his hearing on this petition to determine the constitutionality of his imprisonment.

Duly sworn to by Larry Dayton Hudson—Jurat omitted in printing.

[fol. 86] IN THE SUPERIOR COURT OF CUMBERLAND COUNTY

STATE

VS.

LARRY DAYTON HUDSON

ORDER DISMISSING PETITION FOR CERTIORARI—Sept. 29, 1958

This cause coming on to be heard and being heard upon the petition of Larry Dayton Hudson, dated August 8, 1958, entitled "Petition For Writ of Certiorari", and filed in the Superior Court of Cumberland County, said petition being treated and heard as a proceeding under the North Carolina Post-Conviction Act, G. S. 15-217, et seq. the petitioner being present in Court and represented by his Court appointed counsel, N. H. Person, a member of the Cumberland County Bar. The petitioner alleged in his petition that at his trial at the March 1958 Term of the Superior Court of Cumberland County the Court refused to appoint counsel to defend him, admitted incompetent evidence against him, and that his constitutional rights were violated. No written answer was filed by the State but the Solicitor for the State orally stated to the Court that the

allegations of the petition were denied, and moved to dismiss said petition. The Court, after hearing the evidence presented, reading a transcript of the evidence taken at the petitioner's trial, examining the Court papers in the case, and after hearing argument of counsel, finds the following facts:

1. That the petitioner and two codefendants, Ray Starling and David Cain, were tried at the March 1958 Term of the Superior Court of Cumberland County upon a bill of indictment charging them with robbery, the said David Cain being represented by N. H. McGeachy, Jr., attorney, and the petitioner and the said Ray Starling not being represented by counsel.

2. That when the case was called for trial the petitioner stated to the presiding Judge, Honorable Heman R. Clark, that the petitioner did not have funds to employ an attor- [fol. 87] ney, that petitioner was not capable of defending himself, and asked the Court to appoint counsel for him. That the Court thereupon told the petitioner that the Court would try to see that the petitioner's rights were protected throughout the case, and the Court did not appoint counsel for the petitioner.

3. That Mr. N. H. McGeachy, Jr., attorney for David Cain, told the Court that he would help all three defendants so long as there was no conflict of interest but the Court thought there might be some conflict of interest, and Mr. McGeachy represented only the defendant David Cain at said trial.

4. That the petitioner never requested Mr. McGeachy to represent him either before or during the trial, and, except as above stated, Mr. McGeachy never offered to represent the petitioner at said trial.

5. That the Court advised the petitioner of his right to challenge when the jury was selected and advised the petitioner of his right to cross examine witnesses and to argue the case to the jury.

6. That during the trial the Court properly excluded evidence which was inadmissible, and the petitioner cross examined the witnesses against him and at his request testified in his own behalf.

7. At the close of the State's evidence and after motion for nonsuit was overruled the defendant, David Cain,

through his counsel, Mr. McGeachy, tendered a plea of guilty of larceny, which was accepted by the State, and the trial proceeded as to the petitioner and the defendant Ray Starling, who were found guilty by the jury of larceny from the person.

8. The petitioner was sentenced to imprisonment for a term of not less than three (3) years and not more than five (5) years in the State's Prison and within ten days gave notice of appeal.

9. At the April 1958 Term of the Superior Court of Cumberland County Honorable Leo Carr, Judge presiding, entered an order allowing the petitioner sixty days from the 25th day of April 1958 to serve statement of case on appeal and the petitioner was permitted to appeal without giving security for costs, as provided by G. S. 15-181.

[fol. 88] 10. That on the 26th day of June 1958, Honorable Leo Carr issued a Writ of Habeas Corpus at the petitioner's request, and at a hearing upon the return thereof on the same day Judge Carr entered an order denying the relief sought by the petitioner. On the same date Judge Carr, upon motion of the Solicitor for the State, entered an order adjudging that the petitioner's appeal to the Supreme Court had been abandoned and ordered that commitment be issued upon the sentence adjudged by Judge Clark at the March 1958 Term of Court.

11. That although the petitioner was only eighteen years of age and had been only to the sixth grade in school at the time of his trial, he is intelligent, well informed, and was familiar with and experienced in Court procedure and criminal trials, having been previously tried on different occasions for careless and reckless driving, for breaking and entering, for driving while under the influence of intoxicating liquor, and for assault and robbery, the last two cases being tried at the February 1958 Term of the Superior Court and the petitioner not being represented by counsel in these two cases. The petitioner, conducting his own defense, was acquitted of said assault and robbery charge tried at said February 1958 Term.

12. That the petitioner was convicted by a jury after a fair and impartial trial, presided over by an able and learned judge, and the evidence presented at this hearing fails to show any special circumstances which required the appointment of counsel for the petitioner.

Upon the foregoing facts it is the opinion of the Court and the Court concludes that Judge Clark's failure to appoint counsel for the petitioner did not deprive him of due process of law or deny him any substantial constitutional right; that the petitioner has had a fair and impartial trial, and that he is not entitled to the relief sought by his petition.

Now, Therefore, upon motion of the Solicitor for the State, and upon the foregoing findings of facts and conclusions of law, it is Ordered, Adjudged, and Decreed that the petitioner's petition be and the same is hereby dismissed.

[fol. 89] Entered this 29th day of September 1958, in open Court at Fayetteville, North Carolina.

/s/ C. W. Hall, Judge Presiding.

[fol. 90] In the Supreme Court of North Carolina

Fall Term 1958

State

vs.

Larry Dayton Hudson

Order Denying Petition for Writ of Certiorari—January 15, 1959

This matter came on to be considered by the Chief Justice and Associate Justices of the Supreme Court of North Carolina on the fourteenth of January, 1959, upon a petition for writ of certiorari to whom it appeared that the said petition should be denied;

Now, therefore, it is ordered accordingly that the petition be and the same is hereby denied, and that it be so certified to the Clerk of the Superior Court of Cumberland County, North Carolina.

Witness my hand and official seal this the fifteenth day of January, 1959.

Adrian J. Newton, Clerk of Supreme Court of North Carolina.

[fol. 91] Clerk's Certificate Omitted in Printing.

[fol. 92] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1959

No. 22 Misc.

LARRY DAYTON HUDSON, PETITIONER

vs.

NORTH CAROLINA

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—OCTOBER 12, 1959

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 466.

October 12, 1959.

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FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 466

LARRY DAYTON HUDSON,

Petitioner,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONER

WILLIAM JOSLIN,
600 Capital Club Building,
Raleigh, North Carolina,
Counsel for Petitioner.

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OCTOBER TERM, 1959

No. 466

LARRY DAYTON HUDSON,

Petitioner,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONER

Opinions Below

The Supreme Court of the State of North Carolina denied the petition for writ of certiorari without opinion. The judgment entered by the Clerk of the Supreme Court of North Carolina is not reported (R. 64).

The opinion of the Judge Presiding over the Superior Court of Cumberland County, North Carolina, dismissing the petition under the North Carolina Post-Conviction Act is not reported (R. 61-64).

Jurisdiction

The final judgment of the Supreme Court of the State of North Carolina was entered on January 15, 1959 (R. 64). Petition for certiorari was filed April 10, 1959 and was granted October 12, 1959. The jurisdiction of this Court rests on 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the failure of the trial judge to grant petitioner's pre-trial request for the appointment of counsel to defend him on a charge of common law robbery, a felony, deprived him of liberty without due process of law, as guaranteed by the Fourteenth Amendment, petitioner being an eighteen-year-old boy without funds to employ counsel?

2. Whether the failure of the State of North Carolina to provide counsel at the request of this indigent petitioner, on trial for a felony, deprived him of the equal protection of the laws and of due process of law, as guaranteed by the Fourteenth Amendment, when by state law other defendants with means, facing similar charges would be entitled to counsel for their defense?

Statutes and Constitutional Provisions Involved

North Carolina General Statutes § 15-4 provides as follows:

> "*Accused Entitled to Counsel.*—Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense."

North Carolina Constitution, Article I, § 11 provides as follows:

> *"In Criminal Prosecutions.*—In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

The Fourteenth Amendment to the United States Constitution provides in part as follows:

> "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioner, Larry Dayton Hudson, was arrested February 18, 1958 on a warrant charging him, Ray Starling and David Cain with larceny from the person (R. 1). Following a hearing on February 25, 1958 in the Recorder's Court of Cumberland County, the petitioner and the other defendants were bound over to the Superior Court of Cumberland County under $200.00 bond (R. 2-3). The record does not show that the petitioner or the other defendants were able to raise the $200.00 bond.

At the March Criminal Term of Cumberland County Superior Court, the grand jury returned an indictment charging the petitioner, Ray Starling, and David Cain with the robbery of $24.00 from the person of one W. G. Spell (R. 3). The case came on for trial on March 13, 1958 before Judge Heman Clark. The State of North Carolina was represented by the Solicitor and the Assistant Solicitor; co-defendant David Cain was represented by Hector McGeachy, Esquire, an attorney of his own selection, and the defendants, Larry Dayton Hudson and Ray Starling, were not represented by counsel (R. 4).

The petitioner, Larry Dayton Hudson, was then eighteen years old and had been only to the sixth grade in school (R. 63). He had previously been tried on several different occasions, and had been convicted of careless and reckless driving, of breaking and entering, and of driving under the influence of liquor (R. 41, 63). His co-defendant, Ray Starling, was then 23 years old (R. 36). Charges were also brought against a fourth defendant, Rubin Grimsley, but these had been transferred to the juvenile court because he was only 15 years old (R. 31, 32).

Before pleading to the bill of indictment, the petitioner, Larry Dayton Hudson, stated in open court: "I don't have funds to employ an attorney and am not capable of defending myself. If the Court please, I would like to ask the Court to employ me an attorney" (R. 4). The State admitted his inability to employ an attorney (R. 4). Judge Clark denied the motion, stating that "the Court will try to see that your rights are protected throughout the case" (R. 4).

All three of the defendants thereupon pleaded not guilty and the case proceeded immediately to trial. The principal witness for the State of North Carolina was W. G. Spell.

Midway through the direct examination of this witness, Attorney McGeachy offered to serve as counsel for petitioner and for defendant, Ray Starling, so long as their defense did not conflict with the interest of his client, David Cain (R. 6). Judge Clark made no ruling or comment at this time on this offer of counsel. After W. G. Spell had completed his direct testimony, the trial judge told Attorney McGeachy that he thought the interests of his client probably were in conflict with those of the other two defendants, and that he should cross-examine for his client alone, and not for the other two (R. 11).

This witness was questioned by Judge Clark regarding statements made in his presence by petitioner, Larry Dayton Hudson (R. 11, 12). Afterwards he was cross-examined intensively by Attorney McGeachy (R. 13-25), who brought out the witness' prior criminal record and his previous 18-month commitment to Dix Hill, a State mental institution (R. 24). Petitioner and co-defendant, Ray Starling, then followed with brief cross-examination of the witness (R. 23, 25, 26).

The only other witnesses for the State were two deputy sheriffs. Their testimony in large part dealt with statements which they said the defendants, David Cain, and Ray Starling had made to them. One such statement by Ray Starling was said to have been made in the presence of the petitioner, Larry Dayton Hudson, at a time when both were under arrest and were being held on the third floor of the jail (R. 29, 30). The trial judge ruled generally that these statements were admissible in evidence only against the defendants said to have been present when they were made. These two deputy sheriffs were cross-examined briefly by Attorney McGeachy, but were not cross-examined by the petitioner Larry Dayton Hudson, or by co-defendant Ray Starling (R. 31, 34).

At the conclusion of the State's evidence, Attorney McGeachy moved that the case be dismissed. This motion was overruled. Thereupon in open court he stated that the defendant Cain had no evidence to offer, and he tendered a plea of guilty to the offense of petty larceny, a misdemeanor, which plea was accepted by the State (R. 35).

The defendant Ray Starling, and the petitioner Larry Dayton Hudson then took the stand. Each made a statement in which he denied the charges against himself and further denied that W. G. Spell had been robbed. Petitioner was cross-examined with special emphasis being placed on his prior record (R. 41, 42). Neither petitioner nor his co-defendant, Ray Starling, produced any other witnesses or offered any further evidence. They were given an opportunity to argue their cases to the jury, but declined to do so (R. 45).

Following Judge Clark's charge to the jury, the jury returned verdicts of guilty to the lesser offense of larceny from the person against both the petitioner Larry Dayton Hudson and co-defendant Ray Starling.

The following day Judge Clark imposed a six months suspended sentence on the defendant David Cain. He sentenced the petitioner Larry Dayton Hudson to State's Prison for a period of not less than 3 nor more than 5 years. He sentenced the defendant Ray Starling to Cumberland County jail for a period of not less than 18 months nor more than 2 years, such time to be served on the roads (R. 55).

Two days later petitioner, Larry Dayton Hudson, by letter gave Notice of Appeal to the North Carolina Supreme Court (R. 56). His appearance bond was set at $2,500.00.

Petitioner next filed a petition for a writ of habeas corpus before Judge Leo Carr, who was presiding over Cumberland County Superior Court. Judge Carr issued the writ

on June 26, 1958, and entered an order later that day denying the relief requested (R. 63).

On the same date, Judge Carr, upon motion of the Solicitor, dismissed petitioner's pending appeal. The ground for dismissal of the appeal was the failure of the petitioner to serve his case on appeal upon the Solicitor on or before June 24, 1958, the deadline for this action (R. 58).

Thereafter petitioner Larry Dayton Hudson filed a "petition for a writ of certiorari" with the Cumberland County Superior Court. This petition was treated as a proceeding under the North Carolina Post-Conviction Act. Among the grounds urged for a new trial in the petition was the failure of the trial judge to provide him with counsel at his trial, after petitioner had asked the judge to do so (R. 59-61). Judge C. W. Hall appointed N. H. Person, a member of the Cumberland County Bar to represent petitioner at this hearing. On behalf of the State, the Solicitor orally denied the allegations of the petition and moved for its dismissal.

At the hearing Judge C. W. Hall took additional evidence and read the transcript of the trial. He found that the trial judge had apprised the petitioner of his rights to challenge the jury, to cross-examine witnesses and to argue his case to the jury. He concluded that the petitioner had received a fair and impartial trial, and that no special circumstances were shown which required the appointment of counsel. Accordingly, he ruled that the failure of the trial court to appoint counsel for the petitioner did not deprive him of due process of law or deny him any substantial constitutional right, and he dismissed his petition (R. 63, 64).

Thereafter petitioner Larry Dayton Hudson petitioned the North Carolina Supreme Court for a petition of certiorari to review Judge Hall's judgment. The North Caro-

lina Supreme Court denied the petition by order entered January 15, 1959 (R. 64). A petition for certiorari to this court, asking for a review of the judgment of the North Carolina Supreme Court was filed April 10, 1959. This Court granted the petition on October 12, 1959. By order of this Court on November 9, 1959, the motion for appointment of counsel was granted, and William Joslin, Esquire, of Raleigh, North Carolina, a member of the Bar of this Court, was appointed to represent him.

Summary of Argument

1. The Fourteenth Amendment to the United States Constitution forbids any State to deprive a person of his liberty without due process of law.

This Amendment, as interpreted by this Court, requires a State to provide counsel for a defendant charged with a non-capital felony where special circumstances show his inability to make his own defense. *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252 (1942); *Uveges* v. *Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184 (1948).

In this case, the petitioner, who was an eighteen-year-old boy with only a sixth grade education, was charged with the crime of robbery, a felony. He lacked the funds to hire his own attorney, and before pleading to the indictment, requested the trial court to appoint an attorney for him, stating that he was unable to defend himself. Under these circumstances, the failure of the trial court to name an attorney for him, and his subsequent conviction, deprived him of his liberty without due process of law. The *facts of record* in this case are almost identical with those set forth in *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948) and clearly bring this case within the holding of this Court in the *Wade* case.

Moreover, the vast majority of states, by constitution, statute, rule of court, or court decision, now require the appointment of counsel, upon request, in all felonies or "serious" cases. The due process clause, reflecting as it does the recognized standards of fairness in our society thus includes a requirement that a defendant be provided with counsel under these circumstances.

2. The Fourteenth Amendment to the United States Constitution forbids any State to deny to any person within its jurisdiction the equal protection of the laws. The State of North Carolina tried and convicted petitioner on a felony charge without counsel for his defense, although he requested the appointment of counsel in apt time for the reason that he lacked funds to hire his own lawyer. Petitioner was denied the assistance of counsel under circumstances where one with adequate means who faced a similar charge would have a constitutional right to retain his own counsel.

This Court has held that, although the due process clause does not require that a State provide a right of appeal for a defendant; yet, if it does give such a right, it cannot in effect deny the right to poor defendants. The due process clause and the equal protection clause of the Fourteenth Amendment forbid such a discrimination based upon financial means. *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585 (1956).

North Carolina guarantees to every defendant in criminal cases the "benefit of counsel." But petitioner in this case despite a timely request was denied that right because of his poverty. The right to counsel is an even more fundamental ingredient of a fair hearing and trial than the right of appeal. Thus petitioner lost this fundamental right solely because he lacked the means to assert it. Such discrimina-

tion violates petitioner's right to the equal protection of the laws, and to due process, as guaranted by the Fourteenth Amendment.

ARGUMENT

1.

The Petitioner Was Deprived of His Liberty Without Due Process of Law Guaranteed by the Fourteenth Amendment by the Failure of the Trial Judge to Honor His Timely Request for the Appointment of Counsel, and by His Subsequent Conviction of a Felony.

A—Introduction

The petitioner, an eighteen-year-old youth with a sixth grade education, as soon as his case was called, told the trial judge that he had no funds to employ an attorney, was incapable of conducting his own defense, and requested the Court to employ an attorney for him. The Solicitor admitted petitioner's inability to hire a lawyer, but refused to say whether or not he was able to represent himself.

The petitioner was facing an indictment for the offense of common law robbery. This crime is not defined in the North Carolina General Statutes, but the essential elements of the crime are set out in numerous decisions of the North Carolina Supreme Court. See, for example, *State* v. *Brown*, 113 NC 645, 18 SE 51 (1893); *State* v. *Lunsford*, 229 NC 229, 49 SE 2d 410 (1948); *State* v. *Sipes*, 233 NC 633, 65 SE 2d 127 (1951).

The crime of common law robbery constitutes a felony under North Carolina law. *In re Ferguson*, 235 NC 121, 68 SE 2d 792 (1952). The maximum and minimum punishment for this crime is found in the section applicable to

felonies in general. North Carolina General Statutes § 14.2 provides that a person convicted of a felony "for which no specific punishment is prescribed by statute shall be imprisoned in the County jail or State prison not exceeding two years, or be fined in the discretion of the court, or, if the offense be infamous, the person offending shall be imprisoned in the County jail or State prison not less than four months nor more than ten years, or be fined." Under this provision the North Carolina Supreme Court has held that the maximum sentence for one convicted of common law robbery is ten years in State's prison. *In re Sellers*, 234 NC 648, 68 SE 2d 308 (1951).

Likewise the crime of larceny from the person, of which the petitioner was convicted, is a felony punishable in the court's discretion by imprisonment in State's prison for a period not exceeding ten years. North Carolina General Statutes §§ 14-70, 14-72; *State* v. *Bynum*, 117 NC 749, 23 SE 218 (1895); *State* v. *Harris*, 119 NC 811, 26 SE 148 (1896).

The petitioner was thus tried and convicted of a felony without the assistance of counsel for his defense, although he had made a timely request for the appointment of counsel. After having been convicted, petitioner sought to take an appeal, as allowed by law; however, he, a layman, failed to comply with the North Carolina procedural requirement for preparing and serving his "case on appeal" on the Solicitor within the time allowed. Hence, he lost his right to appeal on the merits of his conviction, again for lack of a lawyer's aid in complying with the rules of procedure.

Petitioner next sought a review of his trial and conviction through the avenue available to all North Carolina prisoners who claim a denial of their constitutional rights, namely, the North Carolina Post-Conviction Act. North

Carolina General Statutes § 15-217 et seq. This Act provides a remedy analogous to the common law writ of error coram nobis. This procedure only applies to questions of a denial of constitutional rights, and cannot be used as a substitute for an appeal, or as a means to raise legal questions that could have been raised by an appeal. *State* v. *Cruse*, 238 NC 53, 76 SE 2d 320 (1953).

Upon the filing of the petition with the trial court, the judge appoints counsel for the prisoner, if he requests counsel and if the judge is satisfied that he lacks the means to obtain counsel. This appointment is made regardless of the crime, whether felony or misdemeanor, for which the prisoner has been convicted. North Carolina General Statutes § 15-219.

Accordingly, in this case, upon receipt of petitioner's "Petition for Writ of Certiorari", again asking for appointment of counsel (R. 61), Judge Hall of the Superior Court appointed N. H. Person, a member of the local bar, to represent him. The gravamen of the petition was the refusal of the trial judge to appoint counsel upon request at the trial. Thus, this case presents the anomalous situation of the court as a matter of right appointing counsel for an indigent prisoner to help him argue that his constitutional right to a fair trial had been denied by the failure of the trial judge to appoint counsel for him upon his request at his original trial. If counsel were needed in petitioner's Post-Conviction hearing limited to constitutional questions, how much greater was his need at the original trial when counsel could have assisted him on questions of trial tactics, admissibility of evidence, criminal procedure and argument to the judge and jury, as well as on constitutional questions!

B—This Case Comes Within the Category of "Special Circumstances" Previously Recognized by This Court in Non-Capital Cases as Requiring Appointment of Counsel Under the Due Process Clause

This Court has adhered to the well-established rule that the due process clause of the Fourteenth Amendment to the United States Constitution incorporates those rights and protections for an accused that are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152 (1937); see also *Bartkus* v. *Illinois*, 359 U. S. 121, 127-128; 79 S. Ct. 676, 680 (1959). In each case it is necessary to consider whether the denial of a given right imposed a hardship on the defendant "so acute and shocking that our polity will not endure it. Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" *Palko* v. *Connecticut*, 302 U. S. 319, 328, 58 S. Ct. 149, 153 (1937).

This definition of the meaning of the due process clause of the Fourteenth Amendment necessarily allows a certain area for growth and development as new situations arise. "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at any given time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U. S. 25, 27, 69 S. Ct. 1359, 1361 (1949).

Beginning with the well-known case of *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55 (1932), this court has applied the due process clause in a variety of situations where a defendant in a state court prosecution alleges a violation of due process of law in that the State failed to appoint counsel

for his defense. Although the *Powell* case dealt with a defendant accused of a capital offense, the reasoning of Justice Sutherland applies with equal force to non-capital cases as well: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 64 (1932).

The strict holding of the *Powell* case was that in a capital case, where the defendant is unable to employ counsel, and is incapable of making his own defense, the trial court, whether requested or not, must assign counsel for him as a necessary requisite to due process of law.

In line with this holding, this Court has reversed state decisions upholding convictions in capital cases where the record failed to show that the defendant's right to counsel had been adequately protected. *Williams* v. *Kaiser*, 323 U. S. 471; 65 S. Ct. 363 (1945); *Tompkins* v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370 (1945); *Hawk* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116 (1945). See *Moore* v. *Michigan*, 355 U. S. 155, 78 S. Ct. 191 (1957); *Reece* v. *Georgia*, 350 U. S. 85, 76 S. Ct. 167 (1956); *DeMeerleer* v. *Michigan*, 329 U. S. 663, 67 S. Ct. 596 (1947).

This same principle has been applied in non-capital cases. Through a long time of decisions this Court has evolved the rule that due process requires the assistance of counsel in state non-capital prosecutions where the accused, because of special circumstances, is incapable of adequately making his own defense and understandingly waiving his constitutional right to counsel. *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252 (1942); *Foster* v. *Illinois*, 332 U. S. 134, 67 S. Ct. 1716 (1947); *Gibbs* v. *Burke*, 337 U. S. 773, 69 S. Ct. 1247 (1949).

This Court has applied this rule by examining into the circumstances of each case where a denial of due process has been urged because of failure to appoint counsel at the trial. In this way this court has pointed out a number of the special conditions that may indicate a need for counsel. Thus the youth of the defendant was an important consideration in *Uveges* v. *Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184 (1948), in *DeMeerleer* v. *Michigan*, 329 U. S. 663, 67 S. Ct. 596 (1947); and in *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948). The lack of formal education of the defendant was noted by this Court in *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 76 S. Ct. 223 (1956), and in *Cash* v. *Culver*, 358 U. S. 633, 79 S. Ct. 432 (1959). The fact that incompetent evidence was introduced, or that erroneous rulings of law went unchallenged at the trial were the special circumstances in *Townsend* v. *Burke*, 334 U. S. 736, 68 S. Ct. 1252 (1948); and in *Gibbs* v. *Burke*, 337 U. S. 773, 69 S. Ct. 1247 (1949).

In *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948), this Court held that the State of Florida had denied the petitioner due process of law by the refusal of the trial court to honor a request for the appointment of defense counsel. The *Wade* case is very nearly on all fours with this case. The facts are summarized in the opinion: "On Feb-

ruary 19, 1945 petitioner Wade was arrested in Palm Beach County, Florida upon the charge of breaking and entering. He was held in jail until brought to trial before a jury on March 14, 1945, in the Criminal Court of Record of Palm Beach County. Just before the trial started, he asked the trial judge to appoint counsel to represent him, claiming that it was financially impossible to employ one himself. The judge refused the request and the trial proceeded. The jury returned a verdict of guilty on the same day and Wade was immediately sentenced to serve five years in the state penitentiary." 334 U. S. 672, 675, 68 S. Ct. 1270, 1272 (1948).

"It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Courtroom, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. . . .

"As the Circuit Court of Appeals pointed out, the evidence at the hearing before the District Court further showed that during the progress of the trial Wade (a) was advised by the trial judge of his right to challenge jurors and excuse as many as six without reason, a right which he did not exercise; (b) was afforded an opportunity, which he accepted, to cross examine state witnesses; (c) took the stand and testified in his own behalf; and (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney." 334 U. S. 672, 683, 68 S. Ct. 1270, 1276 (1948).

Thus in this case, which as the Court said "apparently involved no complicated legal questions," the refusal to honor petitioner's timely request for appointment of counsel was held to have violated his constitutional rights. The dissenting opinion found no fault with the conclusion of the majority on the constitutional question; instead, it was based

upon a failure to exhaust state remedies before resort to the federal courts. 334 U. S. 672, 684, 68 S. Ct. 1270, 1276 (1948).

The points of similarity between this case and petitioner Hudson's case are striking. Both involved eighteen-year-old defendants of limited education who were charged with the commission of a non-capital felony. Both had prior criminal records and thus had some familiarity with the courtroom. Both made timely requests of the trial judge for the appointment of counsel, and both had their requests denied. Both participated to a limited extent in their defense by the cross-examination of at least one witness and by taking the stand. Both were convicted and given prison sentences in the State penitentiary.

In the *Wade* case the federal district court found as a fact that the petitioner was incapable of adequately representing himself. In this case petitioner told the trial judge that he was incapable of defending himself before the trial began (R. 4). Neither Judge Clark, who tried petitioner Hudson, nor Judge Hall, who heard his Post-Conviction petition, found as a fact that petitioner at this trial was capable of adequately representing himself, although Judge Hall did find that petitioner Hudson was "intelligent, well informed, and was familiar with and experienced in Court procedure and criminal trials," and that he, conducting his own defense, was recently acquitted on robbery and assault charges (R. 63). Such a finding must be viewed in light of the facts shown in the record, namely, petitioner's sixth grade education, his use of poor English, his failure to call witnesses for his own defense, his failure to cross-examine the deputy sheriffs who testified against him, his decision to take the stand despite his prior criminal record, his failure to argue to the jury, and his failure to object when his co-defendant changed his plea to guilty in the presence

of the jury. Certainly petitioner Hudson was "intelligent, well informed and was familiar with Court procedure and criminal trials"—enough so to know that he needed a lawyer to defend him on this serious charge of robbery, and intelligent enough to know that "the lawyer who represents himself in Court has a fool for a client."

The "special circumstances" of this case as shown by the record clearly bring it within the line of decisions of this Court on the right to counsel, and particularly within the holding in *Wade* v. *Mayo*, 334 U. S. 672, 68 S. Ct. 1270 (1948).

The fair trial test as approved by this Court involves a perusal by this Court of the record of the trial to determine, among other things, whether that record reveals that the trial judge or the prosecution took advantage of the defendant, permitted inadmissible evidence to be introduced, or made erroneous rulings of law. But without the assistance of counsel, a defendant labors under a serious handicap to make the record show proper exceptions to all of the rulings of the trial judge and to give a complete account of the trial proceedings. See *Foster* v. *Illinois*, 332 U. S. 134, 67 S. Ct. 1716 (1947); *Chessman* v. *Teets*, 350 U. S. 3; 76 S. Ct. 34 (1955). Thus a defendant who is denied counsel must show to a reviewing court an element of unfairness in his trial when he lacks the assistance of one trained to do this very job. Due process of law cannot be confined and limited by such circular reasoning.

In summary, the special circumstances of this case, namely, the youthfulness of the petitioner, his lack of formal education, his timely request for the appointment of counsel, his inability to hire a lawyer, and his own fumbling defense against the serious charge of robbery, taken together show that he was deprived of his liberty without due proc-

ess of law by the failure of the trial judge to appoint counsel for him. These special circumstances bring petitioner's case within the long line of due process cases decided by this Court applying the so-called "fair trial" test in right to counsel cases not involving capital offenses.

C—In Addition, the Denial of Counsel to an Eighteen-Year-Old Youth, Facing Felony Charges, Who Is Too Poor to Hire a Lawyer and Who Makes Timely Request of the Trial Judge for the Appointment of Counsel, Is Such an Affront to the Conscience of Our Society as to Be Forbidden by the Due Process Clause of the Fourteenth Amendment

Although this case falls well within prior holdings of this Court, there is, however, a more fundamental reason why the failure of the trial court to appoint counsel for petitioner upon his timely request deprived him of due process of law. The concept of due process of law is a living principle and cannot be "confined within a permanent catalogue of what may at any time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U. S. 25, 27, 69 S. Ct. 1359, 1361 (1949).

"Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." Justice Frankfurter, concurring in *Griffin* v. *Illinois*, 351 U. S. 12, 20-21; 76 S. Ct. 585, 591 (1956).

In the federal courts, Rules 5(b) and 44 of the Federal Rules of Criminal Procedure, aside from the provisions of the Sixth Amendment, require that the defendant be advised of his right to counsel and further require that counsel be assigned to him at every stage, unless counsel is intelligently waived. 18 U. S. C. following § 687, 327 U. S. 835,

866-867. Most states now by constitution, statute, rule of court, or court decision require the appointment of counsel for an indigent defendant either upon request or as a matter of course, in all felony trials, or in all "serious" cases. Fellman: *The Right to Counsel under State Law*, 1955 Wisc. L. Rev. 281 (1955); Beaney: *The Right to Counsel in American Courts* (1955) pp. 80-141. Since 1930 the American Law Institute in its Code of Criminal Procedure has provided for the appointment of counsel in all felonies, unless the accused retained his own counsel or objected to the appointment. A.L.I.: *Code of Criminal Procedure* (1930), c. 8, § 203.

The debate within the legal profession and among students of the problem has largely moved beyond the question of *whether* the courts of this nation, state and federal, should provide counsel for indigent defendants. The question now has largely become one of *how* counsel for indigent defendants can best be supplied.

As one student of the problem observes, "the law now practically requires either the establishment of a Public Defender System or the subsidization of an institution, such as the Legal Aid Association, which is recognized as qualified to do the job." Williams: *The Indigent Defendant*, 45 ABAJ. 147 (Feb. 1959). The public-defender system, legal aid societies, legal reference plans, and assignment of counsel by the courts are among the plans in use. Brownell: *Legal Aid in the United States* (1951). Each has its own supporters and opponents. See for example, Dimock: *The Public Defender: A Step Towards a Police State*, 42 ABAJ. 219 (March, 1956); and Harrington and Getty: *The Public Defender: A Progressive Step Towards Justice*, 42 ABAJ. 1139 (Dec. 1956). But, whatever the method used to supply counsel for indigent defendants, this debate over the *method* illustrates the general acceptance of the premise that our

system of justice requires that indigent defendants be provided with counsel.

Thus the denial of counsel under the circumstances of this case, the petitioner submits, is a practice which disturbs and shocks the conscience of our society to such an extent that is almost everywhere forbidden. See *Bartkus* v. *Illinois*, 359 U. S. 121, 128, 79 S. Ct. 676 (1959).

Moreover, where the record shows clearly that an indigent defendant charged with a felony requested the trial judge to appoint counsel for him, stating that he was incapable of defending himself, and the trial judge refused his request, the trial judge assumes a heavy burden of responsibility for safeguarding the rights of the defendant. Particularly is this true where, as in this case, another defendant who had his own counsel and whose interests might clash with those of the defendant without counsel is placed on trial with him. Under our adversary system of court procedure and trials, justice requires that the state and the defendant in a criminal case be on a parity at the outset of a trial. Of course, the defendant is not entitled to a lawyer necessarily as competent as the solicitor. But fairness requires that, if the defendant, before the trial starts, recognizing his inability to defend himself and his lack of funds to hire counsel for his assistance, requests the trial judge to appoint counsel for him, the trial judge must honor this request. Commenting on the denial of youthful defendants' requests for appointment of counsel, an authority on this question observes: "Whether the trial judge acts fairly or not is beside the point. The prosecution has three advantages which the defense lacks: investigation of the facts, preparation for the trial, and effective presentation. Guilty or not, a man found guilty after this type of proceeding will inevitably feel that society has done him a great wrong." Beaney: *The Right to Counsel in American*

Courts (1955), p. 208. A requirement that counsel be appointed under these conditions reflects the civilized standard of criminal justice almost universally recognized in this country today. Such a requirement has in fact been set forth in dicta in several cases by the Supreme Court of North Carolina. See *State* v. *Cruse*, 238 NC 53, 59, 76 SE 2d 320, 325 (1953); *State* v. *Hardy*, 189 NC 799, 802, 128 SE 152, 153 (1925). But see *State* v. *Hackney*, 240 NC 230, 81 SE 2d 778 (1954).

The record in this case shows clearly and unequivocally that petitioner, knowing his own inadequacy to conduct his defense against a robbery charge, made a timely request of the trial judge for the appointment of counsel. The refusal of the trial court to grant this request constitutes a sufficient showing of a denial of due process of law as guaranteed by the Fourteenth Amendment to require a reversal of this case. This Court would only be giving the due process clause a meaning consistent with well recognized standards of fairness and justice to hold that a defendant, accused of a felony or serious crime, who made a timely request for appointment of counsel, was entitled to such counsel before proceeding to trial.

2.

The Refusal of the North Carolina Court to Appoint Counsel for the Petitioner, Who Was Too Poor to Hire His Own Attorney and Who Had Requested Such Appointment, Denied Petitioner the Equal Protection of the Laws and Due Process of Law as Guaranteed by the Fourteenth Amendment, When Other Defendants With Adequate Means Would, Under State Law, Have a Right to the Benefit of Counsel.

This Court has held that the equal protection clause and the due process clause together forbid a state to discriminate against an indigent defendant in the administration of its criminal law. Specifically the Court faced the problem posed by the task of conforming state appellate procedures to the requirements of the Amendment. In *Griffin* v. *Illinois*, 351 U. S. 12, 76 S. Ct. 585 (1956) the State of Illinois had refused to furnish a free copy of the trial proceedings to an indigent defendant, convicted of armed robbery, who sought to perfect an appeal. A copy of such proceedings would have been available to the defendant had he been able to pay the necessary fees. For lack of this record, he could not perfect his appeal. This Court held that under the Fourteenth Amendment Illinois could not, on account of poverty, discriminate in its allowance of appellate review. The Court said:

"Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal

trials a State can no more discriminate on account of poverty than on account of religion, race, or color . . . " " . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Griffin* v. *Illinois*, 351 U. S. 12, 17, 19, 76 S. Ct. 585, 590, 591 (1956).

This same governing principle—that the essential elements of a fair trial cannot be denied by a state to any defendant on account of his poverty—has been applied by this Court in similar situations. In *Eskridge* v. *Washington Prison Board*, 357 U. S. 214, 78 S. Ct. 1061 (1958), this Court reaffirmed the *Griffin* case, holding in a per curiam opinion that the State of Washington under the Fourteenth Amendment must not deny to an indigent defendant an appellate review of his conviction, if it permits such review to defendants who can afford the expense of a trial transcript.

Again in *Burn[illegible] Ohio*, 360 U. S. 252, 79 S. Ct. 1164 (1959) this Court held that the failure of the Supreme Court of Ohio to docket an in forma pauperis appeal in a criminal case because the defendant did not pay the docketing fees was a denial of equal justice under law when defendants able to pay these fees were permitted to docket their appeals.

Under the applicable North Carolina statutory and constitutional provisions, a defendant in any criminal case has a right to appear and to defend through counsel of his own selection. North Carolina General Statutes § 15-4; North Carolina Constitution, Art. I, § 11. As interpreted by the North Carolina Supreme Court, the defendant in any criminal case is entitled to the benefit of counsel. See *State*

v. *Hedgebeth*, 228 NC 259, 265, 45 SE 2d 563 (1947); affirmed on a non-federal ground 334 U. S. 806, 68 S. Ct. 1185 (1947). The benefit of counsel under state law exceeds in scope the right to counsel. The traditional right to counsel is that constitutional right as contained in the due process clause of the Fourteenth Amendment and covering all capital cases, and also non-capital cases under special circumstances. But the "benefit of counsel" guaranteed under North Carolina law, extends to all criminal cases, whether felonies or misdemeanors. "The right of every man, accused, prosecuted, or put on trial upon a criminal charge, to be heard, and to have counsel in all matters necessary for his defense, and the right of counsel to argue to the jury the whole case, as well of law as of fact, is too fundamental for discussion." *State* v. *Hardy*, 189 NC 799, 802, 128 SE 152, 153 (1925).

The circumstances of this case serve to point up one obvious way in which petitioner was handicapped by the failure of the trial judge to appoint counsel as requested. Petitioner's co-defendant, David Cain, who employed his own attorney, pleaded guilty to petty larceny and only drew a suspended sentence; petitioner and co-defendant Starling without counsel were found guilty by the jury of a felony and both were sentenced to prison. Certainly counsel experienced in criminal trials can often best serve his client's interests by recommending that, at the appropriate time, a plea of guilty be tendered to a lesser offense. Petitioner's own trial thus demonstrates one of the many ways that counsel for the defense did in fact help in this case.

The North Carolina Legislature in 1951, when it adopted the State's Post-Conviction Act (North Carolina General Statutes § 15-217 *et seq.*) recognized that the right of review thereby granted could become an empty gesture for an in-

digent prisoner. Accordingly, it provided for the appointment of counsel for any prisoner unable to pay for his own lawyer. The State has thus already recognized how fundamental this right is in criminal proceedings.

However, North Carolina law as applied in this case, denies to a defendant who at his trial requests the aid of counsel but who cannot pay for it, that "benefit of counsel" enjoyed by defendants of more modest means. The State thus draws an economic line; all defendants accused of felonies who can pay for counsel are permitted the privilege of defending through counsel, but defendants accused of felonies who cannot pay for counsel must fend for themselves, in the absence of special circumstances requiring appointment of counsel.

The right to be heard through counsel at the trial of a criminal case is as essential to a fair hearing and determination as is the right of appeal. See *Powell* v. *Alabama*, 287 U. S. 45, SE, 53 S. Ct. 55, 64 (1932); *Chandler* v. *Fretag*, 348 U. S. 3, 75 S. Ct. (1954). Compare *Griffin* v. *Illinois*, 351 U. S. 12, 17, 76 S. Ct. 585, 590 (1956). It follows that, since a denial of an appellate review on the ground of poverty is a deprivation of the equal protection of the laws and of due process guaranteed by the Fourteenth Amendment, a denial of the benefit of counsel on the ground of poverty is likewise a deprivation of the rights protected by the same constitutional provisions. So long as North Carolina by statute and constitution guarantees the benefit of counsel to defendants in its courts, the equal protection clause and due process clause demand that it make such benefit available to indigent defendants. As this Court said in *Griffin* v. *Illinois*, 351 U. S. 12, 17, 76 S. Ct. 585, 590 (1956):

"In this tradition, our constitutional guarantees of due process and equal protection both call for procedures in

criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American Court.' Chambers v. Florida, 309 U. S. 227, 241. See also Yick Wo v. Hopkins, 118 U. S. 356, 369."

In conclusion, the equal protection clause and the due process clause of the Fourteenth Amendment forbid the State to discriminate against any defendant charged with a felony who is too poor to hire an attorney for his defense. These clauses require that the State, if it guarantees the benefit of counsel to those defendants who can pay their own attorneys, also provide, at least in a felony case, counsel for an indigent defendant who makes timely request for the appointment of an attorney.

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted.

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FILE COPY

Supreme Court of The United States

October Term, 1959

No. 466

LARRY DAYTON HUDSON, PETITIONER

vs.

NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF THE STATE OF NORTH CAROLINA

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OPINIONS BELOW

The Petitioner prosecuted and was heard upon a petition invoking the North Carolina Post-Conviction Hearing Act, and this was denied by the Judge of the Superior Court on September 29, 1958 (R. 61, 62, 63, 64).

The Petitioner applied for a Writ of Certiorari to the Supreme Court of North Carolina, and this application was denied on January 15, 1959, without opinion (R. 64).

The Petitioner was sentenced on March 14, 1958 (R. 55), and the Petitioner gave notice of appeal to the Supreme Court (R. 56). On June 26, 1958, the Petitioner having failed to prosecute his appeal, the same was adjudged to have been abandoned by the Judge of the Superior Court (R. 58). These orders are not reported in the Official Reports of the Supreme Court of North Carolina, and the orders and judgments of the Superior Courts of the State, which are Courts of general jurisdiction, are recorded in the minutes of the Clerks of

the various Superior Courts, and there are no official reports of this Court.

JURISDICTION

Petition for Certiorari was filed in this cause on April 10, 1959, and was granted by this Court on October 12, 1959, by virtue of the provisions of 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner invokes a portion of the Fourteenth Amendment of the Constitution of the United States, as quoted below:

> "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 11, of the North Carolina Constitution, is as follows:

> "*In Criminal Prosecutions.*—In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

STATUTES OF NORTH CAROLINA INVOLVED

General Statutes of North Carolina, Sec. 15-4, is as follows:

> "*Accused Entitled to Counsel.*—Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense."

North Carolina General Statutes, Sec. 14-70, is as follows:

"Sec. 14-70. *Distinction between grand and petit larceny abolished.*—All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny, is: Provided, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the State's prison for a period not exceeding ten years."

North Carolina General Statutes, Sec. 14-72 (Cumulative Supplement of 1959), is as follows:

"Sec. 14-72. *Larceny of property, or the receiving of stolen goods, not exceeding one hundred dollars in value.*—The larceny of property; or the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen."

QUESTIONS PRESENTED

The State of North Carolina submits the following as the questions presented in this case:

(1) Were Petitioner's constitutional rights, as guaranteed by the Due Process Clause of the Fourteenth Amendment, violated, under the circumstances of this case, by the Court's failure to appoint counsel for Petitioner upon request?

(2) Were the Petitioner's constitutional rights, as guaranteed by the Equal Protection of the Laws Clause of the Fourteenth Amendment, and the Due Process Clause of the

Fourteenth Amendment, violated, under the circumstances of this case, because of the Court's failure to appoint counsel for Petitioner upon request when other defendants with adequate means were entitled to the benefit of counsel under State Law?

STATEMENT OF THE CASE

The State of North Carolina gives below the proceedings in this case without any comment on the merits, which is reserved for argument, as follows:

(1) The Petitioner, Larry Dayton Hudson, along with Ray Starling and David Cain, was charged with larceny from the person, and upon preliminary hearing, held February 25, 1958, in the Recorder's Court of Cumberland County, the Petitioner and the other defendants were held for trial in the Superior Court of Cumberland County, which is a Court of general jurisdiction. The record is silent as to whether the Petitioner and the other defendants were able to furnish bond in the amount of $200.00 required for their appearance in the Superior Court.

(2) In the Superior Court the Petitioner and the other defendants were indicted by the Grand Jury upon a charge of robbery from the person (R. 3). The Petitioner and the other defendants were placed on trial on March 13, 1958, and before the trial opened the Petitioner stated that he had no funds with which to employ an attorney, that he was not capable of defending himself and that he would like for the Court to employ an attorney for him (R. 4). The prosecuting officer admitted that the Petitioner was not financially able to employ an attorney and also said that he did not know whether the Petitioner was able to represent himself or not (R. 4). The Court stated to the Petitioner that he (the Court) would see that his rights were protected throughout the case (R. 4). Petitioner's co-defendant, David Cain, obtained counsel of his own choosing and was represented by such counsel. Petitioner's co-defendant, Ray Starling, was not represented by counsel.

(3) Counsel for David Cain stated that all three defendants might be represented by him as long as their interests did not conflict (R. 6). Thereafter it appeared that there was a conflict of interest (R. 11), and the Court stated to counsel for David Cain that he should examine a witness for his own client, and the Court thereafter questioned the witness to some extent (R. 11).

(4) At the close of the evidence for the State counsel for David Cain tendered a plea of guilty of larceny "in such amount that it is a misdemeanor", and this was accepted by the State. The trial proceeded, and the Petitioner and Ray Starling were convicted of larceny from the person (R. 54). The Petitioner and Ray Starling received sentences as appears on R. 55. David Cain was sentenced for a period of six months but the sentence was suspended, and he was placed on probation for a period of five years under the supervision of the North Carolina Probation Commission.

(5) Thereafter the Petitioner, Larry Dayton Hudson, gave notice of appeal to the Supreme Court of North Carolina (R. 56). The Petitioner was allowed to enter his appeal and perfect it to the Supreme Court of North Carolina if he so desired (R. 57). The Petitioner did not perfect the appeal and it was adjudged to be abandoned, as shown on R. 58.

(6) Thereafter the Petitioner filed a Petition for Writ of Certiorari in the Superior Court of Cumberland County which was treated as an application, or petition, under the North Carolina Post-Conviction Hearing Act. The Petition for Writ of Certiorari appears on R. 59, and this proceeding was duly heard by the Superior Court who appointed counsel to represent the Petitioner. The Superior Court upon this hearing made Findings of Fact and signed an order dismissing the petition, which appears on R. 61, 62, 63, 64.

(7) Thereafter the Petitioner filed a Petition for Writ of Certiorari in the Supreme Court of North Carolina seeking a review of this Post-Conviction proceeding, and this petition, or application, was denied by the Supreme Court of North Carolina, as shown on R. 64.

SUMMARY OF ARGUMENT

The State of North Carolina does not deny that the Petitioner was indicted for the offense of common law robbery, that this offense is a felony, and that it can be punishable, if infamous, by a prison sentence of as much as ten years. The Petitioner was convicted of larceny of the person, which is also a felony punishable by as much as ten years as a maximum.

The State of North Carolina will argue that there is no question for this Court to consider under the State Constitution and State Statutes as to appointment of counsel. It is believed that the rules of the State of North Carolina in this respect are substantially in accord with the Federal rules (STATE v. HEDGEBETH, 228 N. C. 259, 45 S. E. 2d 563, cert. dismissed, 334 U. S. 806, 92 L. ed. 1739, 68 S. Ct. 1185; IN RE TAYLOR, 229 N. C. 297, 49 S. E. 2d 749).

The State of North Carolina will argue that the line of decisions of this Court dealing with the appointment of counsel in capital cases, or in cases dealing with life imprisonment, is not applicable to this case at all and that these cases (TOMPKINS v. MISSOURI, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370; POWELL v. ALABAMA, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55) represent the same doctrine as that held by the North Carolina Supreme Court in capital cases.

It will be argued by the State of North Carolina that this case falls within the reasoning and rules decided by this Court in BETTS v. BRADY, 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252; FOSTER v. ILLINOIS, 332 U. S. 134, 91 L. ed. 1955, 67 S. Ct. 1716; GIBBS v. BURKE, 337 U. S. 773, 93 L. ed. 1687, 69 S. Ct. 1247. It will further be argued that the reasoning of this Court in UVAGES v. PENNSYLVANIA, 335 U. S. 437, 93 L. ed. 127, 69 S. Ct. 184, shows that this case falls within the second classification in the opinion where the Court will make an evaluation of the gravity of the crime, the age and education of the Defendant, the conduct of the Court, and then determine whether the failure to appoint c o u n s e l

amounts to fundamental unfairness prohibited by the Fourteenth Amendment.

It will further be argued by the State of North Carolina that a review of the record in this case will show that there was no unfairness in the trial, the evidence as to the commission of the offense was direct and simple, that no incompetent evidence was introduced against the Petitioner and that the record shows that the Petitioner handled his own case well and was protected not only by the Court but also to a large extent by the attorney who represented the Petitioner's co-defendant, David Cain.

Last of all, the State of North Carolina contends that the fact that some persons can obtain counsel by their own finances does not result in any violation of equal protection of the laws from the simple fact that an indigent defendant is not given counsel, plus the fact that no unfairness resulted against him in the trial.

ARGUMENT

A

THE CONSTITUTION AND STATUTES OF NORTH CAROLINA HAVE NO APPLICATION IN THIS CASE.

The position of the State of North Carolina on appointment of counsel is clearly stated in STATE v. HEDGEBETH, 228 N. C. 259, 45 S. E. 2d 563. In this case it is said:

> "In capital felonies these provisions relative to counsel are regarded as not merely permissive but mandatory. This is indicated by the statute, G. S. 15-5, and by numerous decisions of this Court. S. v. COLLINS, 70 N. C. 242; S. v. JACOBS, 107 N. C. 772, 11 S. E. 962; S. v. HARDY, 189 N. C. 799, 128 S. E. 152; S. v. WHITFIELD, 206 N. C. 696, 175 S. E. 93; S. v. FARRELL, 223 N. C. 321, 26 S. E. 2d 322; POWELL v. ALABAMA, 287 U. S. 45. But in cases of misdemeanors and felonies less than capital it has been the uniform practice in this jurisdic-

tion to regard these provisions as guaranteeing the right of persons accused to have counsel for their defense, to be represented by counsel, and the right to have counsel assigned if requested and the circumstances are such, for financial or other reasons, as to show the apparent necessity of counsel for the protection of the defendant's right.

"But we cannot hold that in all cases, in the absence of any present statute to that effect, the burden is imposed upon the state to provide counsel for defendants. In cases less than capital the propriety of providing counsel for the accused must depend upon the circumstances of the individual case, within the sound discretion of the trial judge. In the language of JUSTICE HOLMES in LOCKNER v. NEW YORK, 198 U. S. 45, 'General propositions do not decide concrete cases.'"

The Supreme Court of North Carolina denied certiorari (R. 64), and although no opinion was written it would appear that this is determinative of any question raised under the State Constitution and Statutes.

B

THE TRIAL OF THE PETITIONER, UNDER THE CIRCUMSTANCES IN THIS CASE, WITHOUT COUNSEL, DID NOT RESULT IN ANY FUNDAMENTAL UNFAIRNESS PROHIBITED BY THE FOURTEENTH AMENDMENT.

For the purposes of this argument the State of North Carolina admits that the Petitioner requested the Court to appoint an attorney for him and that it was admitted by one of the prosecuting officers that the Petitioner was not able financially to employ an attorney. Furthermore, the State of North Carolina does not contend that there has been any waiver on the part of the Petitioner in this case, and if Petitioner was entitled to the assistance of counsel, under the facts and circumstances of this case, no contention is made that he waived that right.

The State of North Carolina puts to one side a group of

cases cited by Petitioner dealing either with capital offenses or with felony charges that are highly complex and technical in nature. Many of the cases cited by the Petitioner do not deal with the appointment or assistance of counsel at all. For example, in BURNS v. OHIO, 360 U. S. 252, 3 L. ed. 2d. 1209, 79 S. Ct. 1164, the defendant had been convicted of burglary and sentenced to life imprisonment. He was required by Ohio law to pay a filing fee before permitting him to file a motion for leave to appeal. This Court held that an indigent defendant could not be deprived of his right to appeal because he could not pay the filing fee and that indigents should have the same right in this field as other persons.

In CHESSMAN v. TEETS, 350 U. S. 3, 100 L. ed. 4, 76 S. Ct. 34, the Petitioner in his allegations for a writ of habeas corpus alleged that his appeal to the California Supreme Court from a capital conviction had been heard upon a fraudulently prepared transcript of the trial proceedings. The official court reporter had died before completing the transcription and the Petitioner alleges that the prosecuting attorney and the substitute reporter had by corrupt arrangements prepared the fraudulent transcript. This Court held that upon these allegations the Petitioner should have been heard. There is no question or problem of the assistance of counsel in this phase of the Chessman Case.

In CHANDLER v. FRETAG, 348 U. S. 3, 99 L. ed. 4, 75 S. Ct. 1, the Petitioner was indicted for housebreaking and larceny, and when he appeared in Court, intending to plead guilty, he was advised that this would be a fourth offense and that he would be tried as an habitual criminal and that conviction carried a mandatory sentence of life imprisonment with no possibility of parole. The Petitioner requested a continuance to enable him to obtain counsel on the habitual criminal charge, and this was denied; the Petitioner was put to trial and convicted. This Court said that the Petitioner should have had counsel on the habitual criminal accusation, and, furthermore, this Court said that the Petitioner had not asked for counsel to be appointed but wanted to be assisted by his own counsel and that the Petitioner's right to be heard through his own counsel was unqualified.

In ESKRIDGE v. WASHINGTON STATE BOARD, 357 U. S. 214, 2 L. ed. 2d 1269, 78 S. Ct. 1061, this Court held that the Petitioner was entitled to a transcrpit of the trial proceedings for his appeal and that this could not be denied by the State of Washington because the Petitioner was indigent and that the case was controlled by the Griffin Case.

In DE MEERLEER v. MICHIGAN, 329 U. S. 663, 91 L. ed. 584, 67 S. Ct. 596, the Petitioner, 17-years of age, was charged with murder and on the same day of the indictment was arraigned, tried, convicted and sentenced to life imprisonment. He had no counsel and was never advised of his right to counsel. This Court said that he should have had counsel because he was totally unfamiliar with legal proceedings and he was never told of the consequences of his plea.

In HAWK v. OLSON, 326 U. S. 271, 90 L. ed. 61, the defendant had been convicted of murder and had no advice of counsel prior to the calling of the jury. The case shows that the defendant had been deprived of the effective assistance of counsel and there was an allegation that the conviction was obtained by the use of perjured testimony knowingly used by the prosecuting officials and the trial court. These allegations were taken as true for the purposes of the hearing and it was held that the defendant had stated a cause of action showing deprivation of the assistance of counsel.

In PENNSYLVANIA v. CLAUDY, 350 U. S. 116, 100 L. ed. 126, 76 S. Ct. 223, the Petitioner had pleaded guilty to 30 charges involving various offenses and had been sentenced to serve 17-1/2 to 35 years. The Petitioner was 21-years old and had been to school six years and his only experience with criminal procedure was a plea of guilty to charges of burglary, larceny and forgery. It also appears that after Petitioner's arrest he was held for three days and threatened if he did not confess and that there were threats against the safety of his wife and daughter. The Petitioner finally confessed after 72-hours of intermittent questioning. This Court said that the number and complexity of the charges, as well as their seriousness, were such that no layman could have un-

derstood the accusations, and, therefore, the Petitioner should have been advised of his right to be represented by counsel.

In POWELL v. ALABAMA, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, the defendant was unable to employ counsel in a capital case and was a feeble-minded illiterate. It was the duty, therefore, of the Court to appoint counsel. This Court further said that there had been no effective appointment of counsel.

In REESE v. GEORGIA, 350 U. S. 85, 100 L. ed. 77, 76 S. Ct. 167, the Petitioner was a semi-illiterate Negro indicted on a capital charge. He was appointed counsel but not in time to take advantage of a challenge of the organization of the Grand Jury which under Georgia procedure he should have objected to before the indictments were found. It will thus be seen that the Petitioner did not have counsel in time to make the necessary objections to the composition of the Grand Jury and that appointment of counsel in this capital case was not timely or effective.

In TOMPKINS v. MISSOURI, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370, the Petitioner pleaded guilty to first degree murder and received a life sentence. He was ignorant of his right to demand counsel, and he needed counsel because under Missouri Law one charged with murder in the first degree may also be found guilty of murder in the second degree, or manslaughter, and, therefore, the defenses covered a wide range and the differences between the degrees of crime are technical.

In WILLIAMS v. KAISER, 323 U. S. 471, 89 L. ed. 398, 65 S. Ct. 363, the Petitioner pleaded guilty to robbery by means of a deadly weapon. This was a capital offense in Missouri, and the Petitioner asked for counsel; the request was not granted although Missouri Law seemed to require the appointment of counsel for a person unable to employ one and who is charged with a felony. Since this was a capital charge we have no further comment.

In TOWNSEND v. BURKE, 334 U. S. 736, the Petitioner

was indicted for burglary and armed robbery. He was held incommunicado for a period of 40-hours between his arrest and his plea of guilty. He was not offered counsel, advised of his right to counsel or instructed as to the nature of the crime against him. He had been found not guilty on two other charges, and the Court in sentencing the Petitioner acted on certain assumptions concerning his criminal record which were materially untrue. In this case the Petitioner clearly needed counsel.

The case of WOLF v. COLORADO, 338 U. S. 25, 93 L. ed. 1782, 69 S. Ct. 1359, has nothing to do with the appointment of counsel at all but deals with unreasonable searches and seizures. Likewise, CHAMBERS v. FLORIDA, 309 U. S. 227, 84 L. ed. 716, 60 S. Ct. 472, deals with the subject of an involuntary confession, and YICK WO v. HOPKINS, 118 U. S. 356, deals with the constitutionality of a city ordinance which discriminated against Chinese laundries operated in wooden buildings.

This is a summary of the cases cited by the Petitioner, and with one exception, which will be discussed later, it is submitted that they arise under circumstances totally dissimilar to the case the Court is now considering. Many of these cases come before this Court upon allegations in petitions for writs of habeas corpus, and this Court in some instances has said that it expresses no opinion on what may be developed at the actual hearing. An examination of the cases will show that many are capital cases and are not relevant to this inquiry. Many arise upon multiple charges of complex and technical crimes, and some are aggravated cases in which the petitioners were held incommunicado or involuntary confessions were extorted from them.

The State of North Carolina relies upon the principles decided by this Court in BETTS v. BRADY, 316 U. S. 455, 86 L. ed. 1595, 62 S. Ct. 1252, and as affirmed by this Court in the case of FOSTER v. ILLINOIS, 332 U. S. 134, 91 L. ed. 1955, 67 S. Ct. 1716. We will not quote from these opinions but they do conclude that in the great majority of the states the people,

their representatives and their courts do not consider the appointment of counsel a fundamental right essential to a fair trial in all cases. It is pointed out that to require the appointment of counsel in all cases of criminal charges of different magnitude would lead to the appointment of counsel in small crimes before justices of the peace, equally with capital charges, and even in a traffic court, and that there is no logical reason why this would not extend to civil cases involving property, for the Fourteenth Amendment protects property as well as life and liberty. It is also pointed out in these cases that constitutional provisions to the effect that a defendant should be allowed counsel were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions but were not designed to compel the State to provide counsel in all cases.

The circumstances of this case do not show that the failure to appoint counsel for the Petitioner, Larry Hudson, resulted in any fundamental unfairness. Counsel for the Petitioner has spent much time in the fact that the Court did not appoint counsel, the youth of the Petitioner, the educational status of the Petitioner and various factors which are contained in cases in this Court, but he has spent very little time in pointing out the exact details of unfairness, if any, which existed in this trial. We summarize the trial, as follows:

(1) The Petitioner was indicted upon a charge of common law robbery (R 3) and was convicted on a charge of larceny from the person (R 54).

(2) The Petitioner at this time was 18-years of age and had reached the sixth grade in the public schools, and, as found by the Judge in the hearing on the Post-Conviction Act "He is intelligent, well-informed, and was familiar with and experienced in court procedure and criminal trials, having been previously tried on different occasions for careless and reckless driving, for breaking and entering, for driving while under the influence of intoxicating liquor, and for assault and robbery, the last two cases being tried at the February, 1958, Term of the Superior Court, and the Petitioner not

being represented by counsel in these two cases. The Petitioner, conducting his own defense, was acquitted of said assault and robbery charge tried at the said 1958 Term."

(3) The record in the Post-Conviction Hearing having not been certified to this Court by Petitioner, there is a presumption of regularity and correctness as to the findings of the trial judge (HENDRICKS v. U. S., 219 U. S. 79, 88, 55 L. ed. 102; BOLEY v. GRISWOLD, 87 U. S. 486, 487, 488, 22 L. ed. 375; CUNNINGHAM v. SPRINGER, 204 U. S. 647, 657, 51 L. ed. 662).

(4) The charge against the Petitioner was simple, without complexities and technicalities, and it was simply a question of whether the Petitioner took the prosecuting witness' billfold and the money contained therein in a felonious manner. The prosecuting witness, Mr. G. W. Spell, testified that the Petitioner did take his money and billfold (R. 4-26). The Petitioner testified in his own behalf (R. 40-44) and denied all the material evidence of the State and testified that the billfold was found in the car, with nothing in it, and that his co-defendant, Starling, who found the billfold in the car, threw it out of the car and said there was nothing in it. The case, therefore, was a simple, direct issue before the jury and was largely resolved by the credibility of the witnesses or, in other words, the finding of the jury as to who told the truth.

(5) The Petitioner did ask for counsel, and it was admitted by one of the attorneys for the State that he was not able to employ an attorney of his own and the Court said that it would see that the Petitioner's rights were protected, and an examination of the transcript shows that the Court did just that.

(6) The Petitioner had the benefit of the representation of counsel who appeared for David Cain until there was an apparent conflict, which is shown on R. 11. Therefore, the Court examined the witnesses for the Petitioner except at such times as the Petitioner desired to cross-examine.

(7) The Petitioner had the benefit of a lengthy and search-

ing cross-examination of the prosecuting witness by the attorney who appeared for his co-defendant, David Cain (R. 13-23).

(8) The Court was careful to see that no incompetent evidence was admitted against the Petitioner, as will be shown on R. 7, 26, 27, 29, 30, 33.

(9) There is no evidence whatsoever that the Petitioner was denied compulsory process for witnesses, that the State withheld any evidence or that any perjured testimony was used. Likewise, there is no evidence whatsoever that the Petitioner was ignorant or feeble-minded, but, to the contrary, everything shows that he was extremely intelligent and mentally alert. The cross-examination conducted by the Petitioner, as shown on R. 23, 24, 25, as well as his objections to evidence, as shown on R. 30, 33, and perhaps other places, all show that the Petitioner was familiar with criminal procedure and evidence.

(10) There is no evidence whatsoever that there were any witnesses who could establish an alibi for Petitioner, but, to the contrary, the Petitioner in his own evidence (R. 40) testified that he was with the prosecuting witness in the automobile.

(11) There is no evidence whatsoever or any suggestion that the Petitioner was not present when the crime was committed or that the crime was committed by other persons with whom the Petitioner had no connection.

(12) The instructions of the Court to the jury were full and ample and Petitioner cannot complain that anything fundamentally unfair was inflicted upon him during this trial. The Petitioner was simply convicted of a simple offense, which is a felony, and he does not like his punishment.

The burden is on the Petitioner to show that his constitutional rights have been violated (BUCHALTER v. NEW YORK, 319 U. S. 427, 431, 87 L. ed. 1492, 1496; ADAMS v. UNITED STATES, 317 U. S. 269, 281, 87 L. ed. 268, 275).

The Petitioner relies upon WADE v. MAYO, 334 U. S. 672, 92 L. ed. 1647, 68 S. Ct. 1270 but it is apparent that this is a habeas corpus proceeding and the Court decided that it was proper to entertain the petition upon the petitioner's own allegations. As to the failure to appoint counsel for Wade, this Court based its decision upon the findings and conclusions of the District Court as a factual matter and as being a judgment peculiarly within the province of the judge who passed upon the facts and who had personal observation of Wade. This Court said in substance that some individuals because of age, ignorance or mental capacity cannot adequately represent themselves in a simple prosecution and that "this incapacity is purely personal and can be determined only by an examination and observation of the individual."

We would point out that in the case of STATE v. HEDGEBETH, 228 N. C. 259, 45 S. E. 2d 563, the Petitioner was a tenant farmer, 24-years of age, and had not been beyond the third grade in school. He was of average mentality but was ignorant and unacquainted with business or legal affairs; he had not been arrested before and was inexperienced in court procedure. The Supreme Court of North Carolina held that it was not necessary to appoint counsel, and this Court dismissed the petition for certiorari after the case was argued before it (HEDGEBETH v. NORTH CAROLINA, 334 U. S. 806, 92 L. ed. 1739, 68 S. Ct. 1185.) This Court based its dismissal on a nonfederal ground because the full record was not before the Supreme Court. Likewise, it is apparent from this transcript that the full record was not before the Supreme Court of North Carolina on the Post-Conviction Hearing Act, and the denial of certiorari (R. 64) is based upon the Post-Conviction Hearing.

C

THE DENIAL OF CERTIORARI IN THE SUPREME COURT OF NORTH CAROLINA COULD REST UPON A NONFEDERAL GROUND.

The Petitioner in this case did not perfect his appeal to the Supreme Court of North Carolina. He could have raised the

question of failure to appoint counsel upon request by means of an appeal (STATE v. GIBSON, 229 N. C. 497, 50 S. E. 2d 520; STATE v. WAGSTAFF, 235 N. C. 69, 68 S. E. 2d 858).

The North Carolina Post-Conviction Hearing Act cannot be used as a substitute for an appeal or to raise legal questions that could have been raised by an appeal (STATE v. CRUSE, 238 N. C. 53, 76 S. E. 2d 320; MILLER v. STATE, 237 N. C. 29, 74 S. E. 2d 513). The Petitioner had a full and adequate remedy under North Carolina practice by the use of the writ of error coram nobis (IN RE TAYLOR, 230 N. C. 566, 53 S. E. 2d 857). The denial of certiorari, therefore, by the Supreme Court of North Carolina can rest upon an adequate nonfederal ground.

D

THERE IS NO QUESTION PRESENTED AS TO EQUAL PROTECTION OF THE LAWS.

Last of all, Petitioner insists that because counsel was not appointed for him, and that other defendants can have counsel if they have adequate means, constitutes a violation of equal protection of the laws. It is evident from the Brief of Counsel for the Petitioner and the citations on Legal Aid and Public Defenders that Counsel is contending that the Fourteenth Amendment requires that counsel shall be appointed in all cases and that this is a bid for this Court to overrule BETTS v. BRADY, supra. The Petitioner relies upon GRIFFIN v. ILLINOIS, 351 U. S. 12, 76 S. Ct. 585, and cases that stem from that decision. We submit that there is a vast difference between foreclosing an appeal for lack of money and the appointment of counsel. North Carolina provides for pauper appeals, and what the Petitioner is asking is that first the Court hold that counsel must be appointed in all felony cases, and then counsel makes a bid for public offenders by asking that the Court in essence appoint counsel in all cases. It is submitted that if this had been a violation of equal protection of the laws, then this Court would have so held long ago, and the cases of BETTS v. BRADY, supra, and FOSTER v. ILLINOIS, supra, would have set forth different principles and different conclusions.

CONCLUSION

The State of North Carolina submits that no fundamental unfairness resulted to the Petitioner because of failure to appoint counsel in this case. On the contrary, the trial judge was zealous to protect the Petitioner at all stages of the trial. We ask this Court to uphold the principle given in FOSTER v. ILLINOIS, supra, when it said:

> "After all, due process, 'itself a historical product,' JACKMAN v. ROSENBAUM CO., 260 U. S. 22, 31, 67 L. ed. 107, 112, 43 S. Ct. 9, is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the States have lived not only before the Fourteenth Amendment but for the eighty years since its adoption. It does not militate against respect for the deeply rooted systems of criminal justice in the States that such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."

The State of North Carolina, therefore, asks this Court to dismiss this Petition and if the Petition is not dismissed we ask the Court to hold that under the circumstances of this case the constitutional rights of Petitioner, as guaranteed by the Fourteenth Amendment, have not been violated.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 466.—October Term, 1959.

Larry Dayton Hudson, Petitioner, v. State of North Carolina. | On Writ of Certiorari to the Supreme Court of North Carolina.

[June 20, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner and two others were brought to trial before a jury in the Superior Court of Cumberland County, North Carolina, upon an indictment jointly charging them with robbery. When their case was called one of the defendants, David Cain, was represented by a lawyer of his own selection. The petitioner and the other defendant did not have counsel. Before pleading to the indictment, the petitioner, who was eighteen years old, asked the presiding judge to appoint a lawyer to help him with his defense, stating that he was without funds to employ counsel and was incapable of defending himself.[1] The prosecutor conceded that the petitioner was unable to employ an attorney.[2] The trial judge denied the motion, telling the petitioner that "the Court will try to see that your rights are protected throughout the case."

All three of the defendants thereupon pleaded not guilty, and the case proceeded immediately to trial. The first witness for the State was the alleged victim of the robbery. Midway through this witness's testimony

[1] "I don't have funds to employ an attorney and I am not capable of defending myself. If the Court please, I would like to ask the Court to employ me an attorney."

[2] "I will say that he is not able to employ an attorney but as to whether he is able to represent himself I cannot say."

Cain's lawyer offered to represent all three codefendants "as long as their interests don't conflict." At the conclusion of the witness's direct testimony the trial judge advised the lawyer that he should cross-examine only on behalf of Cain, because "I think you probably have a conflicting interest there." Thereafter the witness was cross-examined intensely by Cain's lawyer, who brought out the witness's criminal record and previous commitment to a state mental institution. The petitioner and the other codefendant also briefly cross-examined the witness. The only other witnesses for the prosecution were two deputy sheriffs, who testified as to statements made to them by the defendants. They were cross-examined by the lawyer, but not by the two defendants without counsel.

At the conclusion of the State's evidence, Cain's lawyer moved that the case be dismissed. When this motion was denied he stated that Cain had no evidence to offer. Thereupon, in the presence of the jury, he tendered on behalf of Cain a plea of guilty to petit larceny. This plea was agreed to by the prosecutor and accepted by the court. The lawyer then withdrew from the proceedings.

The trial proceeded. The petitioner and his remaining codefendant each took the stand. Each made a statement denying the robbery. The petitioner was cross-examined at some length, with emphasis upon his previous criminal record. Neither the petitioner nor his codefendant produced any other witnesses or offered any further evidence. They were given an opportunity to argue their case to the jury, but did not do so.

The jury found both defendants guilty of larceny from the person, a felony under North Carolina law, and the following day the trial judge pronounced sentence. The petitioner was committed to the penitentiary for a term of three to five years. The codefendant convicted with him was sentenced to a jail term of eighteen months to

two years. Cain was given a six months' suspended sentence.

The petitioner's subsequent appeal to the Supreme Court of North Carolina was dismissed for want of prosecution. Thereafter he filed in the trial court a "petition for writ of certiorari," which urged that the failure of the trial court to provide him with counsel had deprived him of his constitutional rights. This petition was treated as an application for relief under the North Carolina Post-Conviction Hearing Act.[3] In the subsequent proceedings the court appointed a lawyer to represent the petitioner,[4] and held a hearing at which the petitioner and his counsel were present. After considering the evidence presented, including a transcript of the trial proceedings,[5] the court concluded that no special circumstances were shown which required the appointment of trial counsel, that the petitioner had been convicted only after a fair and impartial trial, and that there had con-

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[3] N. C. Gen. Stat., § 15–217 *et seq.*

[4] The North Carolina Post-Conviction Hearing Act provides: "If the petition alleges that the petitioner is without funds to pay the costs of the proceeding, and is unable to give a costs bond with sureties for the payment of the costs for the proceeding and is unable to furnish security for costs by means of a mortgage or lien upon property to secure the costs, the court may order that the petitioner be permitted to proceed to prosecute such proceeding without providing for the payment of costs. If the petitioner is without counsel and alleges in the petition that he is without means of any nature sufficient to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means sufficient to procure counsel. The court shall fix the compensation to be paid such counsel which, when so determined, shall be paid by the county in which the conviction occurred." N. C. Gen. Stat., § 15–219.

[5] The judge who conducted the post-conviction proceedings was not the judge who had presided at the trial.

sequently been no denial of due process of law. The petition was accordingly dismissed.* The Supreme Court of North Carolina declined to review the order of dismissal. We granted certiorari to consider the substantial constitutional claim asserted. 361 U. S. 812.

The judge who presided at the post-conviction proceedings made detailed findings of fact. He found that the trial judge had "advised the petitioner of his right to challenge when the jury was selected and advised the petitioner of his right to cross examine witnesses and to argue the case to the jury." He also found that "during the trial the Court properly excluded evidence which was inadmissible, and the petitioner cross examined the witnesses against him and at his request testified in his own behalf."

In this Court counsel for the petitioner does not take issue with these findings. Counsel's primary emphasis rather is upon the petitioner's comparative youth, relying upon *Wade* v. *Mayo*, 334 U. S. 672. In that case it was held that the denial of a lawyer's help had resulted in the deprivation of due process where the Federal District Court after a habeas corpus hearing had found that the eighteen-year-old defendant was "an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself." 334 U. S., at 683. Here, by contrast, the post-conviction court found that "although the petitioner was only eighteen years of age and had been only to the sixth grade in school at the time

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* The dismissal was clearly based upon the court's view of the merits of the petitioner's constitutional claim. The court nowhere suggested that the petitioner had chosen an inappropriate remedy under the State law. Indeed the Supreme Court of North Carolina has made clear that claims of unconstitutional denial of the right to counsel are to be considered on their merits in Post-Conviction Hearing Act proceedings. *State* v. *Hackney*, 240 N. C. 230, 81 S. E. 2d 778; *State* v. *Cruse*, 238 N. C. 53, 76 S. E. 2d 320.

of his trial, he is intelligent, well-informed, and was familiar with and experienced in Court procedure and criminal trials . . . ." Evaluations of this nature are peculiarly within the province of the trier of the facts based upon personal observation. As the Court pointed out in *Wade* v. *Mayo*, "[t]here are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simply nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual." 334 U. S., at 684.

In view of the findings of the post-conviction court, supported by the record of the trial proceedings, this, in short, is not a case where it can be said that the failure to appoint counsel for the defendant resulted in a constitutionally unfair trial either because of deliberate overreaching by court or prosecutor or simply because of the defendant's chronological age. Moreover, the record shows that up to the time that Cain's lawyer withdrew from the proceedings the petitioner was receiving the effective benefit of the lawyer's activity, and had the trial of all three defendants proceeded to a jury verdict, it is possible that the lawyer could have continued to represent the interests of the petitioner as well as those of the client who had retained him.

But that did not happen. Instead, on the advice of his counsel Cain entered a plea of guilt in the presence of the jury midway through the trial. The potential prejudice of such an occurrence is obvious and has long been recognized by the courts of North Carolina. *State* v. *Hunter*, 94 N. C. 829, 835; *State* v. *Bryant*, 236 N. C. 745, 747, 73 S. E. 2d 791, 792; *State* v. *Kerley*, 246 N. C. 157, 97 S. E. 2d 876. Yet it was precisely at this moment of great potential prejudice that the petitioner and his codefendant were left entirely to their own devices, for it was then that Cain's lawyer withdrew from the case. At

that very point the petitioner and his codefendant were left to go it alone.

The precise course to be followed by a North Carolina trial court in order to cure the prejudice that may result from a codefendant's guilty plea does not appear to have been made entirely clear by the North Carolina decisions. In the *Hunter* case the Supreme Court of North Carolina pointed out that while not infrequently a defendant on trial with another is allowed to enter a plea of guilt during the course of the trial, the court should exercise care "to see that such practice works no undue prejudice to another party on trial." 94 N. C., at 835. Later cases have been somewhat more explicit. In the *Bryant* case curative instructions to the jury given immediately after a codefendant's guilty plea were held sufficient to avoid error prejudicial to the remaining defendant. 236 N. C., at 747–748, 73 S. E. 2d, at 792. More recently, in the *Kerley* case, the court said that "[w]hen request therefor is made, it is the duty of the trial judge to instruct the jury that a codefendant's plea of guilty is not to be considered as evidence bearing upon the guilt of the defendant then on trial and that the latter's guilt must be determined solely on the basis of the evidence *against him* and without reference to the codefendant's plea." 246 N. C., at 161; 97 S. E. 2d, at 879. Indeed, the court expressed the view that even "a positive instruction probably would not have removed entirely the subtle prejudice that unavoidably resulted from [a codefendant's] plea. . . ." 246 N. C., at 162; 97 S. E. 2d, at 880.

In the present case the petitioner did not make any request that the jury be instructed to disregard Cain's guilty plea, and the court gave none, either at the time the plea was entered or in finally instructing the jury. A layman would hardly be aware of the fact that he was entitled to any protection from the prejudicial effect of a codefendant's plea of guilt. Even less could he

be expected to know the proper course to follow in order to invoke such protection. The very uncertainty of the North Carolina law in this respect serves to underline the petitioner's need for counsel to advise him.

The post-conviction court made no finding specifically evaluating the prejudicial effect of Cain's plea of guilt and the trial judge's subsequent failure to give cautionary instructions to the jury. In any event, we cannot escape the responsibility of making our own examination of the record. *Spano* v. *New York*, 360 U. S. 315, 316. We hold that the circumstances which thus arose during the course of the petitioner's trial made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment. The prejudicial position in which the petitioner found himself when his codefendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman's ken. *Gibbs* v. *Burke*, 337 U. S. 773; *Cash* v. *Culver*, 358 U. S. 633.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 466.—October Term, 1959.

Larry Dayton Hudson, Petitioner, v. State of North Carolina. } On Writ of Certiorari to the Supreme Court of North Carolina.

[June 20, 1960.]

Mr. Justice Clark, whom Mr. Justice Whittaker joins, dissenting.

The opinion of the Court bids fair to "furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." *Foster* v. *Illinois*, 332 U. S. 134, 139 (1947). Without so much as mentioning *Betts* v. *Brady*, 316 U. S. 455 (1942), it cuts serious inroads into that holding and releases petitioner, now a fourth offender though only 18 years old, from his 3-to-5-year sentence for larceny from the person. The Court does so on the ground of a single circumstance occurring at the trial, *i. e.*, the fact that a codefendant, David Cain, was permitted at the close of the State's case to plead guilty to "larceny, in such amount that it is a misdemeanor." The Court says that this circumstance "made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment." Strangely enough, the Court digs up this ground *sua sponte*, for neither the petitioner, the State, nor any court of North Carolina thought such circumstance produced sufficient "unfairness" in the trial even to discuss it, though its existence was mentioned in the recital of facts in petitioner's brief. The truth is that the courts of North Carolina have held affirmatively that petitioner received a fair trial, and that no special circum-

stances were shown to indicate that lack of counsel resulted in prejudice to petitioner.

The Court, however, speculates that Cain's change in plea "raised problems requiring professional knowledge and experience beyond a layman's ken." The Court says that "[T]he prejudicial position in which the petitioner found himself" resulted. But this is purely speculative and, I submit, does not at all follow. In fact, the jury—despite language in the court's charge which indicated the presence of "violence, intimidation and putting [the victim] in fear"—refused to find petitioner guilty of the common-law offense of robbery but only found him guilty of the lesser offense, larceny from the person. The record here would clearly support a verdict of guilty on the robbery charge. As I appraise the jury's verdict, it would be much more realistic to say that David Cain's plea of guilty influenced the jury not to find petitioner guilty of the greater offense. After all, Cain was only the driver of the car and participated no further in the criminal enterprise. In fact the victim could not even identify him at the trial. Cain, unlike petitioner, had "wholeheartedly admitted" his guilt to the officers. This apparently brought on his plea. Petitioner on the other hand was the chief actor in the criminal enterprise. In addition, he had a criminal record, had served a term in prison, was twice an escapee therefrom, and from the record here gives every appearance of being a hardened criminal. Still the jury found him guilty only of the lesser offense, larceny from the person. It is reasonable to assume that it did this because Cain was permitted to plead to the lesser offense of larceny.

The Court cites three North Carolina cases* in support of the "potential prejudice" which it finds petitioner may

State v. Hunter, 94 N. C. 829, 835; *State v. Bryant*, 236 N. C. 745, 747, 73 S. E. 2d 791, 792; *State v. Kerley*, 246 N. C. 157, 97 S. E. 2d 876.

have suffered from Cain's change of plea. None of these cases were cited by the parties. As I have said, the point was not raised in the briefs. But even the North Carolina cases cited by the Court do not support its new theory for reversal. All they indicate, as the Court frankly points out, is that care must be exercised to avoid "undue prejudice." In this regard the trial court fully protected petitioner all during the presentation of the case and gave a full, fair, and intelligent charge to which no objection is even now being made by petitioner. It is intimated by the Court that North Carolina law required a charge that Cain's plea not be considered as any evidence bearing on petitioner's guilt. But the short answer is that three North Carolina courts have considered this case and not one has even mentioned the point. The Court says this underlines the petitioner's need for counsel. I submit that he has had counsel since his Post Conviction Hearing Act case was filed some two years ago, and not once has the handling of the Cain plea been urged as error necessitating reversal.

While I do not wish to labor the issue, I must say that careful study of the case convinces me that it was a simple one and the trial was without complexity or technicality. The petitioner and three others induced their victim, an elderly man, to enter their car on the ruse that they would take him home for a dollar. It was in the nighttime and on the way to his home they drove into some woods. Petitioner ordered the victim out of the car, directed him to hold up his hands, and then went through his pockets, taking his billfold, containing some $24. The sole question for the jury was one of fact, namely, did petitioner take the old man's money? The State offered three witnesses in support of its position. The petitioner and his codefendant took the stand and gave their version of the affair, each admitting his presence on the scene but denying any robbery. There is not and never has been any

claim that the State withheld any evidence or used perjured testimony or that incompetent evidence was admitted against the petitioner; or that he was denied compulsory process for witnesses; or that he was ignorant or feeble-minded, or that the instructions of the court were not full and sufficient. As the Court itself finds, this "is not a case" where the age of the defendant or the deliberate "overreaching by court or prosecutor" resulted in an "unfair trial." Moreover, the Court finds that the case upon which the petitioner primarily depends, *Wade* v. *Mayo*, 334 U. S. 672 (1948), is in nowise controlling. It therefore follows that the lone special circumstances upon which petitioner depends, namely, his "youthfulness, . . . his lack of formal education, his timely request for the appointment of counsel, his inability to hire a lawyer, and his own fumbling defense," do not show a lack of due process based on the trial judge's refusal to appoint counsel for him.

The record clearly shows, as the trial court found, that the petitioner "is intelligent, well-informed, and was familiar with and experienced in Court procedure and criminal trials, having been previously tried on different occasions for careless and reckless driving, for breaking and entering, for driving while under the influence of intoxicating liquor, and for assault and robbery." Only at the previous term of the same court, petitioner had defended himself on the assault and robbery charge and was found not guilty by the jury. But what more could emphasize the petitioner's ingenuity in defending himself than his defense here? It was simple and direct. Both he and his codefendant had this story: The victim, before entering the car, had been drinking beer and on the way home gave petitioner the money to buy a pint of vodka. After they all partook of the vodka the victim became ill and nauseated while sitting in the back of the car. The petitioner then got in the back seat, and when the car

was stopped he helped the victim out and the latter fell down on the ground. Petitioner then got back in the car and his group drove away. After leaving the victim, petitioner's codefendant found the billfold in the car. It "almost went behind the [back] seat." It had no money in it but petitioner proposed that they take it back to the victim. They then returned to where the victim got out of the car but he was gone, and although they "got out and hollered for him," he could not be found. After the defendants left the scene, the billfold was thrown from the car by petitioner's codefendant and was not produced at the trial. This was indeed a shrewd defense. The only trouble was that the jury did not believe it.

On the facts of this record, I can see no basis for saying that petitioner was denied due process, *Betts* v. *Brady*, *supra*, and accordingly would affirm the judgment.